Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.,

Petitioner,

v.

PERRYMAN CONSULTANTS, INC., M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, INC., and ARGOSY GAMING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conduct of the Respondents, which the jury found "knowingly and intentionally made materially false, untrue, and/or misleading representations" to a state administrative agency acting solely as an adjudicatory body and found by the jury to be in violation of state law (namely, the Louisiana Riverboat Gaming Act and the Louisiana Unfair Trade Practices Law), is a legitimate exercise of the right to petition for redress protected under the First Amendment of the United States Constitution?

2. If Respondents' illegal conduct and other misrepresentations found by a jury to be in violation of state law before a state administrative agency acting solely as an adjudicatory body is considered petitioning activity under the First Amendment of the United States Constitution, whether that conduct is protected under the *Noerr-Pennington* doctrine from liability under state law claims?

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INTRODUCTION

In a radical, overbroad extension of the *Noerr-Pennington* doctrine, far beyond the well-settled limits of the First Amendment of the United States Constitution and in conflict with the relevant decisions of this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) ("*California Motor Transport*"), *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)("*Allied Tube*"), and *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002) ("*BE&K*"), the Louisiana Court of Appeal, First Circuit, improperly extended the *Noerr-Pennington* doctrine to protect the intentional submission of false material representations made to an administrative agency acting solely as an adjudicatory body. The court protected acts that violated the prescribed procedures of that agency's adjudicatory process, allowed an illegal result caused by misrepresentations, and protected illegal acts found by a jury to be in violation of several Louisiana state laws; it, therefore, protected acts outside First Amendment rights and improperly extended this federal antitrust defense to "immunize" the respondents' misrepresentations from liability under state tort law claims. The Louisiana supreme court declined to review the appellate court's decision.

Although the *Noerr-Pennington* doctrine does apply to the right to petition for redress made in administrative or judicial processes, this Court has repeatedly emphasized in *California Motor Transport*, *Allied Tube*, and *BE&K* that this doctrine

has limits in an adjudicatory setting. This Court held that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." [emphasis added.] *California Motor Transport*, 404 U.S. at 513. In *Allied Tube*, 486 U.S. at 499-500, this Court recognized that "unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations". In *BE&K*, this Court: "emphasized that such immunity [under *Noerr*] did not extend to 'illegal and reprehensible practice[s] which may corrupt the ... judicial proces[s],'" *BE&K*, 536 U.S. at 525.

However, this Court has not directly addressed "to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" made in an administrative or judicial process. *Professional Real Estate Investors v. Columbia Pictures Industries* ("*PRE*"), 508 U.S. 49, 61 n.6 (1993). This Court should answer this important question as lower courts have applied the *Noerr-Pennington* doctrine in an inconsistent and unpredictable manner.

Petitioner respectfully requests that a writ of certiorari issue to the Louisiana court to review the radical and overbroad extension of the *Noerr-Pennington* doctrine, to reverse this incorrect decision, and to hold that the doctrine does not extend to misrepresentations made used in an adjudicatory process.

OPINIONS BELOW

This matter was tried before a jury in an eleven day trial and the verdict form issued by the jury on February 6, 2007, is reprinted in the Appendix (A-) A-51 to A-53. The trial court issued a Judgment consistent with the jury verdict form on April 24, 2007. A-45 to A-49. The Respondents filed a motion for judgment notwithstanding the verdict; the trial court granted the motion and issued an Amended Judgment on September 27, 2007. A-41 to A-44. The opinion of the Louisiana court of appeal, first circuit, was issued on August 28, 2009 and is published at 2009 WL 2900764. A-2 to A-40 Petitioner filed a petition for rehearing of the opinion, which was denied by the court of appeal on November 6, 2009. A-50. Petitioner filed a Writ of Certiorari to the Louisiana supreme court, which was denied on February 12, 2010, and is published at 27 So.3d 856 (La. 2/12/10). A-1.

JURISDICTION

The 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, had jurisdiction over Petitioner's action under La. Const. art. 5, §16. The Louisiana court of appeal had jurisdiction to review the Amended Judgment issued by the trial court under La. Const. art. 5, §10(A). The Louisiana supreme court had jurisdiction to consider the Petitioner's Writ of Certiorari under La. Const. art. 5, §5(F). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

By the summer of 1994, the Louisiana Riverboat Gaming Enforcement Division of the Office of State Police ("the Gaming Division") had issued all but two of the fifteen riverboat casino licenses authorized by the Louisiana Riverboat Economic Development and Gaming Control Act, La. R.S. 27:41 *et seq.* ("the Riverboat Act"). A-3. Only three competitors filed applications for the two remaining licenses earmarked for Baton Rouge, Louisiana: 1) Lady Luck Baton Rouge, Inc. ("Lady Luck"); 2) Jazz Enterprises, Inc. and Argosy Gaming Company, which formed Catfish Queen Partnership in Commendam (collectively "Jazz/Argosy"); and 3) Louisiana Casino Cruises, Inc. ("LCC"). A-4.

The Gaming Division determined that all three competitors were suitable to operate a riverboat casino license ("License") under the requirements set forth in the Riverboat Act. A-4. As a tie-breaker, the Gaming Division, with the assistance of a consultant, ranked the economic

impact of the projects proposed by the three competitors; the Jazz/Argosy project was ranked first, the LCC project second, and the Lady Luck project third. A-4. On July 18, 1994, after hearings conducted during July 7-11, 1994, the Gaming Division issued orders awarding the last two remaining Licenses to Jazz/Argosy and LCC. A-4. Although the Gaming Division found Lady Luck to be qualified under all requirements of the Riverboat Act, it issued an order denying Lady Luck's application for a License without prejudice "on the grounds that all fifteen licenses have been issued". A-68.

Capitol House Preservation Company, L.L.C. ("Capitol House" or "Petitioner") as the successor-in-interest to Lady Luck, filed suit against Jazz/Argosy asserting damage claims solely under Louisiana state tort law, including the Louisiana Unfair Trade Practices and Consumer Protection Law ("Louisiana Unfair Trade Practices Law"), La. R.S. 51:1401, *et seq.* and La. Civil Code article 2315(A). A-5. La. R.S. 51:1409(A) provides a private cause of action to recover damages to "[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice . . ." La. Civil Code article 2315(A) provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Capitol House alleged that Jazz/Argosy and its principals made false and misleading statements

in the License application process that disqualified Jazz/Argosy from obtaining a License under the Riverboat Act. A-5. Capitol House also alleged Jazz/Argosy, its business competitor, obtained an unfair competitive advantage in the License process over Petitioner through these illegal and deceitful acts. A-6. After much pre-trial motion and appellate practice conducted over the next eleven years wherein the appellate courts found in four reported decisions that Petitioner had the right to pursue its claims under state law, the case proceeded against the respondents to trial in early 2007. A-6 to A-10.

After an eleven day trial, the jury made the following factual determinations:

1. Jazz/Argosy "knowingly and intentionally made materially false, untrue, and/or misleading representations" in their License application,

2. The misrepresentations of Jazz/Argosy violated the Riverboat Act,

3. Jazz/Argosy "knowingly failed to disclose a violation of the Riverboat Act in contravention of their continuing duty to disclose such a violation",

4. The License application of Jazz/Argosy "would have been denied based on the submission of materially false, untrue,

and/or misleading representations in their application",

5. The acts of Jazz/Argosy constituted a violation of the Louisiana Unfair Trade Practices Law,

6. Petitioner would have been awarded the License had the Respondents not been issued the License,

7. Petitioner suffered an ascertainable loss such that it was entitled to recover damages as a result of Jazz/Argosy's actions, and

8. Petitioner was entitled to an award of damages.

A-51 to A-53. Jazz/Argosy appealed.

On appeal, the state court did not disturb the jury's determination of these facts but vacated the judgment upon finding that Jazz/Argosy was not liable under the Louisiana Unfair Trade Practices Law based on the limited federal antitrust defense afforded by the *Noerr-Pennington* doctrine. A-38 to A-39. The Louisiana supreme court declined to review this decision (A-1) and this petition follows.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to reverse the state court's radical and overbroad extension of the *Noerr-Pennington* doctrine to protect illegal conduct and misrepresentations intentionally made to an administrative agency acting as an adjudicatory body, well beyond the First Amendment rights upon which the doctrine is founded. The jury found that Jazz/Argosy intentionally made material false statements in their License application submitted to the Gaming Division. A-51. Further, the jury found that Jazz/Argosy's conduct violated the Riverboat Act--the "prescribed procedures" of the Gaming Division--and that conduct also violated the Louisiana Unfair Trade Practices Law. A-51 to A-52. An act violates the Louisiana Unfair Trade Practices Law when the act offends public policy or when it involves fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct. *Capitol House Preservation Co. v. Perryman Consultants, et al.*, 725 So.2d 523, 529-530 (La.App. 1st Cir. 12/10/98), *writ denied*, 740 So.2d 637 (La. 4/9/99) ("*Capitol House*").

As this Court held in *California Motor Transport*, the misrepresentations of Jazz/Argosy "are not immunized when used in the adjudicatory process." *Id.*, 404 U.S. at 513. The *Noerr-Pennington* doctrine does not extend to protect the illegal and deceitful conduct of Jazz/Argosy that abused the Gaming Division's adjudicatory process, which constitutes the "unethical and deceptive practices" and the "illegal and reprehensible practice[s]" that

this Court stated would be outside the protection of *Noerr-Pennington* in *Allied Tube*, 486 U.S. at 499-500, and *BE&K*, 536 U.S. at 525, respectively.

Further, Jazz/Argosy's successful scheme to defraud the Gaming Division achieved an "illegal result" because Jazz/Argosy received a License that the jury found would have denied under the Riverboat Act. A-52.

The right to petition granted by the First Amendment is not absolute. The illegal acts and misrepresentations of Jazz/Argosy found by the jury to be in violation of the Riverboat Act and the Louisiana Unfair Trade Practices Law are not entitled to First Amendment protection and are outside the protection of the *Noerr-Pennington* doctrine, as discussed below.

The rulings of the Louisiana court are based on three flawed and unsupportable conclusions: 1. The *Noerr-Pennington* doctrine protects the intentional submission of false material representations made to an agency acting solely as an adjudicatory body unless these misrepresentations "subvert the entire decision-making process"; 2. The *Noerr-Pennington* doctrine protects illegal activity perpetrated before an adjudicatory body; and 3. The scope of the *Noerr-Pennington* doctrine extends beyond the rights protected by the First Amendment when applied to state law claims. The Louisiana court extended the *Noerr-Pennington* doctrine to conduct never before

protected by this Court and is in conflict with the jurisprudence of this Court as discussed below.

The resolution of these issues is critical because many businesses participate in administrative agency proceedings to obtain permits, licenses, or other governmental approvals to engage in business. Economic efficiency requires that these processes operate fairly. Competitors should not be allowed to perpetrate unfair, illegal or deceptive acts in adjudicatory settings under the *Noerr-Pennington* doctrine. In the absence of a decision by this Court on this issue, lower courts have inconsistently ruled on whether misrepresentations in an adjudicatory setting are protected under the *Noerr-Pennington* doctrine. This Court should to provide the much-needed guidance to the lower courts wrestling with this unsettled and important issue.

For the reasons set forth herein, this Court should exercise its supervisory power to grant this petition, reverse the decision of the Louisiana courts, and hold that the *Noerr-Pennington* doctrine does not extend to protect illegal conduct and misrepresentations occurring in an adjudicatory setting.

I. CERTIORARI IS WARRANTED BECAUSE THE LOUISIANA COURTS IMPROPERLY EXTENDED THE *NOERR-PENNINGTON* DOCTRINE TO PROTECT THE INTENTIONAL SUBMISSION OF FALSE MATERIAL REPRESENTATIONS TO AN ADMINISTRATIVE AGENCY ACTING SOLELY AS AN ADJUDICATORY BODY, IN CONFLICT WITH *CALIFORNIA MOTOR TRANSPORT*, *ALLIED TUBE*, AND *BE&K*

Certiorari should be granted because the Louisiana court radically extended the *Noerr-Pennington* doctrine to protect intentional, material misrepresentations submitted to an agency acting solely as an adjudicatory body; it inflated this limited immunity far beyond the activity protected under the First Amendment. In conflict with *California Motor Transport*, *Allied Tube*, and *BE&K*, the lower court found:

> To the extent that the tort claims could be considered outside of the antitrust context, we find that Capitol House has not met its burden of showing that the defendants' acts rose to the level of criminality to satisfy the standard set forth by the [Louisiana Supreme Court] in [*Astoria Entertainment, Inc. v. Edward J. DeBartolo, Jr., et al.*, 12 So.3d 956 (La. 5/22/2009)("*Astoria*")] . . . Accordingly, because the defendants' misrepresentations did not subvert the entire decision-making process, we

> conclude that the *Noerr-Pennington* immunity doctrine affords Argosy immunity from liability under the [Louisiana Unfair Trade Practices Law].

A-38 to A-39. The lower court improperly extended the *Noerr-Pennington* doctrine to protect the intentional submission of false material representations made to an agency acting solely as an adjudicatory body, to protect illegal activity perpetrated before an adjudicatory body, and to protect activity not protected under the First Amendment. The lower court's holding is contrary to the jurisprudence of this Court regarding the *Noerr-Pennington* doctrine as discussed below.

A. The Jurisprudence Of This Court Holds That Misrepresentations Made In An Adjudicatory Process Are Not Protected Under The First Amendment Or The *Noerr-Pennington* Doctrine

Under *Noerr-Pennington*, "[t]hose who petition government for redress are generally immune from antitrust liability". *PRE*, 508 U.S. at 56. The doctrine limits the reach of the antitrust laws by protecting First Amendment guarantees of free speech and freedom to petition the government for redress. This exemption for petitioning the government was first established by this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961)("*Noerr*"), which concerned petitioning before the state executive and legislative branches.

In *Noerr,* this Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr,* 365 U.S. at 135. This Court refused to impute to "the Sherman Act a purpose to regulate, not business activity, but political activity" holding there was "no basis whatever in the legislative history of [the] Act" to support this interpretation, and warned that "such a construction of the Sherman Act would raise important constitutional questions." *Noerr,* 365 U.S. at 137-138. This Court declined to hold a publicity campaign of railroad operators unlawful, as long as the campaign was validly aimed at petitioning the government. *Noerr,* 365 U.S. at 127. The Court held the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had," *Noerr,* 365 U.S. at 140—even though the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business," *Noerr,* 365 U.S. at 138.

In *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965)("*Pennington*"), this Court held that *Noerr* "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington,* 381 U.S. at 670. In describing *Noerr,* this Court stated an "anticompetitive purpose did not illegalize the conduct there involved." *Pennington,* 381 U.S. at 669. *Noerr* immunity was, thus, extended in

Pennington to protect lobbying to the federal executive branch.

In *California Motor Transport*, this Court expanded *Noerr-Pennington* to conduct before administrative agencies and courts. *California Motor Transport*, 404 U.S. at 510-11. According to this Court, to hold otherwise would be destructive of the right of free association and the right to petition embodied in the First Amendment. *Id.*

Notably, this Court held that immunity from antitrust liability based on petitioning activity is not absolute, citing examples in which antitrust liability is imposed for otherwise lawful activity, such as fraudulent patent procurement, conspiracies with licensing authorities, and bribing public purchasing agents. *California Motor Transport*, 404 U.S. at 512-13 (citations omitted). Specifically, this Court recognized the "[u]se of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws." *Id.*, citing to *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 175—177 (1965), just as Jazz/Argosy obtained a License by fraud, which excluded Petitioner from obtaining a License. In *Walker Process*, this Court unequivocally held a party to be subject to antitrust liability "by knowingly and willfully misrepresenting facts to the Patent Office."

Importantly, this Court indicated that the setting in which a misrepresentation takes places dictates whether the activity is protected under the

Noerr-Pennington doctrine. This Court noted that, as in *Noerr*, an unethical and deceptive publicity campaign to influence legislative and executive action may be immune from antitrust liability as "political activity." *California Motor Transport,* 404 U.S. at 516. "Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example." [emphasis added.] *California Motor Transport,* 404 U.S. at 512. The Court distinguished the applicability of the *Noerr-Pennington* doctrine to "political activities" from "conduct in the setting of the adjudicatory process", as follows:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.,* effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are

> involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

[emphasis added.] *California Motor Transport,* 404 U.S. at 513.

This Court, thus, announced an explicit distinction between misrepresentations made in the "political arena", which may be protected under the *Noerr-Pennington* doctrine, and misrepresentations made in the "adjudicatory process", which are not protected. A competitor is exposed to antitrust liability for misrepresentations made in an adjudicatory process. *I.e.* the *Noerr-Pennington* doctrine does not apply to this type of activity.

In *Allied Tube,* this Court held that *Noerr-Pennington* does not extend to "every concerted effort that is genuinely intended to influence governmental action." *Allied Tube,* 486 U.S. at 503. Such a result would be an overbroad application of *Noerr-Pennington. Id.*, at 503-504. Instead, this Court stated that "the applicability of *Noerr* immunity, varies with the context and nature of the activity", with the following considerations:

> A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. *Noerr*, supra, 365 U.S., at 140-

> 141, 81 S.Ct., at 531. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations. *California Motor Transport*, supra, 404 U.S. at 512-513, 92 S.Ct., at 612.

[emphasis added.] *Allied Tube*, 486 U.S. at 499-500. This Court held "the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Id.*, at 504.

Thus, this Court established a spectrum of activity, where, on one end, the *Noerr-Pennington* doctrine will not protect illegal and reprehensible practices perpetrated in the adjudicatory processes of agencies or courts, but on the other end of the spectrum, where the legislative and executive branches lie, such "political" activity is protected. This Court emphasized again that: "A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena." *Allied Tube*, 486 U.S. at 504.

In applying this analysis, this Court distinguished *Allied Tube* from *Noerr*. In *Noerr*, the activities were in the "open political arena, where partisanship is the hallmark of decisionmaking" and such "political activity" has been regulated only with "extreme caution." *Allied Tube*, 486 U.S. at 506-507. In contrast, the *Allied Tube* defendants engaged in

anticompetitive conduct "within the confines of a private standard-setting process." *Id.*, at 506. The Court noted that "antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." *Id.*, at 507.

In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990) ("*SCTLA*"), this Court noted that *Allied Tube* squarely rejected the contention that all efforts genuinely intended to influence the government deserve *Noerr* immunity. *SCTLA,* 493 U.S. at 424-25. In *SCTLA,* trial lawyers agreed to stop providing representation to indigent criminal defendants in the District of Columbia unless legislation providing for an increase in their fees had been passed by a certain date; the increase was not passed and the lawyers boycotted. This Court affirmed the findings that this activity directed to the legislative branch constituted unfair methods of competition in violation of § 5 of the FTC Act and Section 1 of the Sherman Act. *SCTLA,* 493 U.S. at 422. Accordingly, this Court rejected the trial lawyers' argument that their activity enjoyed protection under the First Amendment or the *Noerr-Pennington* doctrine. *SCTLA,* 493 U.S. at 424-425.

In *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365 (1991) ("*Omni*"), the plaintiff asserted claims under the Sherman Act, as well as South Carolina's Unfair Trade Practices Act. This Court found that the defendants were protected under *Noerr-Pennington* "for their activities relating

to enactment of the ordinances", *i.e.* petitioning activity in a legislative setting is protected under the *Noerr-Pennington* doctrine. *Omni,* 499 U.S. at 384. It noted that that *Noerr-Pennington* "rests ultimately upon a recognition that the antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena.'" *Omni,* 499 U.S. at 380, citing *Noerr,* 365 U.S. at 141.

Notably, this Court refused to use *Noerr-Pennington* to "immunize" the claims brought under the South Carolina's Unfair Trade Practices Act, leaving "for determination by the Court of Appeals on remand" "the effect of our judgment" upon Omni's state law claims. *Omni,* 499 U.S. at 394. Petitioner has only asserted state law claims here, including a claim under the Louisiana Unfair Trade Practices Law.

This Court adopted a two-part definition of sham antitrust litigation under the *Noerr-Pennington* doctrine in *PRE,* 508 U.S. 49, 60-61. However, this Court declined to "decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PRE,* 508 U.S. at 61 n.6. Yet, this Court went on to cite examples that impose sanctions on such activity, including Fed.Rule Civ.Proc. 60(b)(3) (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . ., misrepresentation, or other misconduct of an adverse party") and *Walker Process,* 382 U.S. at 176-177 (holding a claim that a patent obtained "by

knowingly and willfully misrepresenting facts to the Patent Office . . . would be sufficient to strip Food Machinery of its exemption from the antitrust laws").

This Court recently examined whether the *Noerr-Pennington* doctrine should be applied to the National Labor Relations Act ("NLRA") in *BE&K*, 536 U.S. 516. *BE&K* raised the same underlying issue of when litigation may be found to violate federal law as in *PRE*, but this time with respect to the NLRA rather than the Sherman Act. Although the right to petition extends to the courts, the Court stressed the limitations of the *Noerr-Pennington* doctrine in an adjudicatory setting, stating:

> "[Th]e right to petition extends to all departments of the Government,"... [*California Motor Transport*, 404 U. S.] at 510.
>
> Even then, however, we emphasized that such immunity [under *Noerr*] did not extend to "illegal and reprehensible practice[s] which may corrupt the ... judicial proces[s]," id., at 513, hearkening back to an earlier statement that antitrust immunity would not extend to lobbying 'ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, supra, at 144. This line of cases thus

> establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not.

[emphasis added.] *BE&K*, 536 U.S. at 525-526.

Although the Court avoided the "difficult First Amendment issue" presented by the case (*BE&K*, 536 U.S. at 535), Justice Breyer's concurring opinion (joined by three other justices) recognized that *PRE* and *Noerr* did not "hold employers enjoy a similar exemption from the reach of the labor laws" and refused to extend the *Noerr-Pennington* doctrine to the NLRA because "antitrust law and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes." *BE&K*, 536 U.S. at 541 (Breyer, J., concurring in part and concurring in the judgment). As *BE&K* shows, this Court has shown a reluctance to extend the *Noerr-Pennington* doctrine outside the context of antitrust context.

Here, the jury found that Jazz/Argosy engaged in illegal and deceitful conduct in the adjudicatory process of the Gaming Division in violation of the Riverboat Act and the Louisiana Unfair Trade Practices Law, and that conduct achieved an illegal result. A-51 to A-53. Petitioner has not asserted any antitrust claims here, but only claims under Louisiana tort law. A-5. Given the jurisprudence set forth by the Court in *California Motor Transport*, *Allied Tube*, and *BE&K*, the conduct of Jazz/Argosy constitutes the misrepresentations and the "illegal and reprehensible practice[s]" in an adjudicatory

process that eliminates *Noerr-Pennington* protection from antitrust liability and, in addition, constitutes "sham petitioning" not protected by the *Noerr-Pennington* doctrine outside the antitrust context as stated in *BE&K*.

B. Jazz/Argosy Intentionally Submitted Material False Representations To The Gaming Division, Acting Solely As An Adjudicatory Body In Violation Of The Prescribed Procedures Of The License Process—Activity Not Protected Under The First Amendment Or Under The *Noerr-Pennington* Doctrine

The Riverboat Act requires an applicant for a License to submit a comprehensive application to the Gaming Division. La. R.S. 27:65(A). A-65. At the conclusion of its investigation, the Gaming Division renders an adjudication on whether the issuance of a License to the applicant is in the best interests of the state and is consistent with the intent of the legislature as expressed in Riverboat Act. La. R.S. 27:73(A). A-66.

The License application required the applicant to list all parties with an ownership interest of 5% or more (A-69), disclose all agreements pertaining to the gaming industry valued at $50,000 or more (A-70), and disclose all contingent liabilities (A-70). In addition, the applicant was required to submit an "Affidavit Of Full Disclosure", which stated "[t]hat, except as reported in [this Application], I have no agreements or understandings with any person or

entity and no present intent to hold as agent, nominee or otherwise any interest in the Application". A-71 to A-72. An applicant was also required to execute a sworn Verification stating "that the information contained in this Form is true, complete and accurate to the best of my knowledge and belief." (A-73).

La. R.S. 27:76(A)(2) provided that the Gaming Division shall not issue a License to an applicant disqualified for the "[f]ailure of the applicant to provide information and documentation to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria." A-67. La. R.S. 27:58(9) of the Riverboat Act mandates the disqualification of a License applicant that violates La. R.S. 27:76(A)(2). A-64. Moreover, the applicant has a continuing duty to inform the Gaming Division if the applicant has violated the Riverboat Act under La. R.S. 27:70(C). A-66.

Rather than follow the prescribed procedures of the Gaming Division's License process, Jazz/Argosy devised and implemented a scheme to defraud the Gaming Division. During the eleven day trial, Petitioner put on evidence of the pervasive and material misrepresentations and omissions Jazz/Argosy made to the Gaming Division, *inter alia*:

1. Jazz/Argosy concealed the true ownership of Jazz in the License application through the use of nominee owners (Ronald Johnson and Mark

Bradley) to conceal the 50%-75% ownership interest held by Steve Urie (*Compare* License application, which stated that Johnson and Bradley each owned 50% of Jazz (A-69 to A-70) to IRS Form 2553 stating Johnson and Urie each owned 50% of Jazz since 2/93 (A-74 to A-75), and Affidavit of Full Disclosure attesting there were no nominee owners (A-71) to Affidavits of Ronald Johnson (A-77) and Mark Bradley (A-80), who both admitted they were nominee owners holding Urie's ownership interest in Jazz);

2. Jazz/Argosy falsely stated in the License application that it had contingent liabilities of $0 (A-70) and concealed contingent liabilities or agreements to pay at least $600,000 to undisclosed parties on the sole condition that a License was issued to Jazz/Argosy, including $250,000 to be paid to Baton Rouge Gaming, Inc. (A-83 to A-85) and $350,000 to be paid to Randy Hayden *et al.* (A-86 to A-89);

3. Jazz/Argosy concealed the ownership interest of not less than 5% of an undisclosed person (Peter Wilday) and an agreement to pay $2,200,000 to Wilday on the condition that a License was issued to Jazz/Argosy (*Compare* the letter dated May 3, 1994 from Jazz to

the Indiana Gaming Commission (A-90 to A-93) with the earlier letter dated April 5, 1994 from Wilday to the Louisiana Gaming Division (A-94 to A-95), where Wilday's interests are disclosed to the Indiana Gaming Commission but affirmatively concealed from the Louisiana Gaming Division); and

4. Jazz/Argosy's use of a bait and switch scheme to defraud, which concealed that Jazz could not finance, much less complete, its project as proposed in the tie-breaker process used by the Gaming Division to determine which of the competitors would receive a License. (A-97 to A-98).

Based on the overwhelming evidence presented at trial below, the jury found that Jazz/Argosy "knowingly and intentionally made materially false, untrue and/or misleading representations in their application for a license", that these misrepresentations violated the Riverboat Act, that the License application would have been denied based on these misrepresentations, and that the License would have been awarded to Petitioner by the Gaming Division. A-51 to A-53. In addition, the jury found that Jazz/Argosy's conduct violated the Louisiana Unfair Trade Practices Law. *Id.* An act violates the Louisiana Unfair Trade Practices Law when the act offends public policy or when it involves fraud, misrepresentation, deception, breach

of fiduciary duty, or other unethical conduct. *Capitol House,* 725 So.2d at 529-530. On appeal, the lower court did not disturb the jury's determination of these facts, but held that Jazz/Argosy was afforded the protection of the *Noerr-Pennington* doctrine from liability under the Louisiana Unfair Trade Practices Law. A-38 to A-39.

In *California Motor Transport,* 404 U.S. at 513, this Court emphasized: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process". *California Motor Transport,* 404 U.S. at 513, and *BE&K,* 536 U.S. at 525-526. In *Allied Tube,* this Court stressed that "unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations" [*Id.*, 486 U.S. at 500] and reiterated: "A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena . . ." [*Id.*, 486 U.S. at 504].

The Gaming Division was clearly acting as an adjudicatory body under La. R.S. 27:73 (A-66) during the License process when Jazz/Argosy intentionally submitted misrepresentations in violation of the Riverboat Act and the Louisiana Unfair Trade Practices Law. Clearly, the misrepresentations and deceitful conduct of Jazz/Argosy constitute "illegal and reprehensible practices" which corrupted and abused the adjudicatory process of the Gaming Division. This Court found the *Noerr-Pennington* doctrine does not extend to such conduct in

California Motor Transport, Allied Tube, and *BE&K*. Therefore, the conduct of Jazz/Argosy was not entitled to protection under the *Noerr-Pennington* doctrine.

Contrary to the sworn statements in the Affidavit of Full Disclosure submitted by Jazz/Argosy in their License application that there were no agreements or interest except those disclosed in the Application, Jazz/Argosy concealed ownership and economic interests in Jazz from the Gaming Division. A-68 to A-95. Thus, sworn statements of material facts in the License application of Jazz/Argosy, the Affidavit of Full Disclosure, and the sworn Verification were false on their face and, indeed, constituted perjury. A-69 to A-73.

In *California Motor Transport*, the Court expressly recognized that perjury of a witness is the type of "unethical conduct in the setting of the adjudicatory process" "which may result in antitrust violations". *California Motor Transport*, 404 U.S. at 512-513. Under *California Motor Transport*, the perjurious statements submitted by Jazz/Argosy in the License application abused the adjudicatory process of the Gaming Division, and the acts of perjury are not entitled to protection under the *Noerr-Pennington* doctrine.

Yet, the state appellate court below held:

> Accordingly, in order for Capitol House to have a viable claim under the UTPL

> that is not otherwise precluded under the *Noerr-Pennington* immunity doctrine, Capitol House must show that the defendants' misrepresentations with regard to these issues subverted the entire decision-making process to the extent that the Division was effectively no longer the real decision maker. See *Woods Exploration*, 438 F.2d at 1295.

A-27. This reliance placed by the court below on *dicta* at p. 1295 in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*. 404 U.S. 1047 (1972) ("*Woods*"), while disregarding the holding of *Woods*, imposed an interpretation of *Noerr-Pennington* at odds with the purpose of the doctrine.

In *Woods*, the Fifth Circuit rejected the defendants' plea for the application of the *Noerr-Pennington* doctrine and held:

> Basic to *Noerr* is a belief that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, an enactment which is itself a political decision. For the political process to be effective there must be freedom of access, regardless of motive, to ensure to 'right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws.' 365 U.S. at 139, 81 S.Ct. at 530.

> [citation omitted] Where these political considerations are absent the *Noerr* doctrine is inapplicable. See Note, The Brakes Fail on the *Noerr* Doctrine, 57 Calif.L.Rev. 518 (1969). . . . We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and require the same result.

[emphasis added.] *Woods*, 438 F.2d at 1296-7.

The Fifth Circuit went on to cite a similar holding by the Ninth Circuit which employed the very same rationale, a decision was subsequently affirmed by this Court in the seminal case of *California Motor Transport*:

> In *Trucking Unlimited v. California Motor Transport Co.*, 9 Cir. 1970, 432 F.2d 755, the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policymaking function; rather they were attempting to undermine a well defined policy with regard to licensing operators by

> blocking and discouraging access to the governmental agencies. Similarly, in the instant case there has been no attempt by defendants there has been no attempt by defendants to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the Noerr sense, and thus participation in those rulemaking proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anticompetitive purposes.

[emphasis added.] *Woods*, 438 F.2d at 1297. These same circumstances are present here.

As *Noerr* instructs, petitioning activity seeks the adoption of laws through a legislative body, and is not participation in an adjudicatory process. *Noerr*, 365 U.S. at 137. Jazz/Argosy was not engaged in the attempt to modify or pass laws before the Gaming Division; it was participating in an administrative adjudication. Jazz/Argosy sought approval of its application for a License from the Gaming Division under the already enacted Riverboat Act, *i.e.* Jazz/Argosy's entire conduct was apolitical. The Gaming Division acted as an adjudicatory body in rendering in rendering its License determinations under La. R.S. 27:73. A-66. Even the lower court acknowledged that "[t]he alleged material

misrepresentations [of Jazz/Argosy] in the underlying case were not designed to influence policy but rather to purportedly undermine the means of effectuating that policy." [Emphasis added]. A-26. Therefore, Jazz/Argosy did not engage in petitioning activity in the sense of *Noerr*, and, as *Woods* and *California Motor Transport* held, the *Noerr-Pennington* doctrine is inapplicable in the absence of "these political considerations".

Moreover, Jazz/Argosy engaged in deceitful conduct and submitted misrepresentations that abused the Gaming Division's adjudicatory process in violation of the Riverboat Act and the Louisiana Unfair Trade Practices Law. The *Noerr-Pennington* doctrine has no application to false and misleading statements made to obtain a state license. This Court in *California Motor Transport, Allied Tube*, and *BE&K* indicated that the *Noerr-Pennington* doctrine does not extend to the "illegal and reprehensible practice[s]" and "unethical and deceptive practices" executed by Jazz/Argosy. Therefore, the Louisiana court erred when it held that "the *Noerr-Pennington* immunity doctrine affords Argosy immunity from liability under the [Louisiana Unfair Trade Practices Law]." A-38 to A-39.

One commentator posits: "Because the Court did not provide guidance [in *PRE*] on how to handle fraud or misrepresentation in litigation and other contexts, the lower courts are in disarray." *The Fraud Exception To The Noerr-Pennington Doctrine In Judicial And Administrative Proceedings*, Daniel J. Davis, 69 U.Chi.L.Rev. 325, 331 (Winter 2002).

For example, the Ninth Circuit held in *Kottle v. Northwest Kidney Center*, 146 F.3d 1056, 1060 (9th Cir 1998), that "litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.'" The Eleventh Circuit reached a similar conclusion in *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986), holding: Misrepresentations to a governmental agency acting judicially "do not enjoy *Noerr* immunity". See *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568, 580 (6th Cir. 1986), where the Sixth Circuit held "knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine". But compare *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.*, 185 F.3d 154,161-64 (3d Cir. 1999), where the Third Circuit held misrepresentations to an administrative agency to block the issuance of a state certificate for a hospital were protected under *Noerr-Pennington*. Yet, *Armstrong* conflicts with the Third Circuit's own decision rendered in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122-124 (3d Cir. 1999)(material misrepresentations that affect the core of a litigant's submissions to an administrative body are not entitled to *Noerr-Pennington* immunity).

Nevertheless, "the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political

arenas than the legislative lobbying at issue in *Noerr* itself." *See* ABA Section Of Antitrust Law, Monograph 25, *The Noerr-Pennington Doctrine* (2009), page 93, n.15, citing *In re Union Oil Co.*, 138 F.T.C. 1, 25 (2004); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis Of Antitrust Principles And Their Application* ¶¶203a-f (3d ed. 2006); C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403 (2001).

This Court should grant this petition to reverse the Louisiana court's radical and overbroad extension of *Noerr-Pennington* to protect illegal conduct and misrepresentations intentionally made to an agency acting as an adjudicatory body. This Court should expressly hold that these type of unethical and deceptive practices conducted in administrative or judicial processes are outside the protection of the First Amendment and the *Noerr-Pennington* doctrine, as emphasized by this Court in *California Motor Transport, Allied Tube*, and *BE&K*.

II. CERTIORARI IS WARRANTED BECAUSE THE LOUISIANA COURT IMPROPERLY EXTENDED THE *NOERR-PENNINGTON* DOCTRINE TO IMMUNIZE ILLEGAL ACTS BEYOND THE WELL-ESTABLISHED LIMITS OF THE FIRST AMENDMENT IN CONFLICT WITH *CALIFORNIA MOTOR TRANSPORT*

Noerr-Pennington immunity rests on two rights under the First Amendment: the right to petition the government for redress and the right to engage in political activity. If activity is outside the rights protected by the First Amendment, then the *Noerr-Pennington* doctrine does not apply.

This Court first applied the *Noerr-Pennington* doctrine to avoid an interpretation of the Sherman Act that would impinge upon the First Amendment right to petition for redress. *Noerr*, 365 U.S. 138. *See SCTLA*, 493 U.S. at 424 (the Court in *Noerr* was "[i]nterpreting the Sherman Act in light of the First Amendment's Petition Clause"); *PRE*, 508 U.S. at 57 ("Nor did we 'impute to Congress an intent to invade' the First Amendment right to petition"); and *BE&K*, 536 U.S. at 525 (*Noerr* doctrine arose when the Court considered the right to petition when interpreting the Sherman Act).

In *California Motor Transport*, this Court discussed the interaction of First Amendment rights and the antitrust laws, as follows:

> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

[emphasis added]. *Id.*, 404 U.S. at 513-514. After citing to several cases that identified the constitutional limits of the right to petition under the First Amendment, this Court held in *California Motor Transport* that "[t]he rationale of those cases . . . makes the following conclusions clear":

> (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

> First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (see *NAACP v. Button*, 371 U.S. 415, 444, 83 S.Ct. 328, 343, 9 L.Ed.2d 405) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful."

[emphasis added] *Id.*, 404 U.S. at 515.

As this Court stated in *Allied Tube*, "the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Id.*, 486 U.S. at 504. In order to understand the impact of Jazz/Argosy's violations of the Riverboat Act, a brief discussion of the Louisiana laws violated by Jazz/Argosy are warranted.

The "prescribed procedures" of the Gaming Division are set forth in the Riverboat Act. The jury found that Jazz/Argosy's misrepresentations and illegal acts violated the Riverboat Act--the "prescribed procedures" of the Gaming Division. A-51 to A-52. In *Capitol House*, the court recognized the obligation of a License applicant to provide full disclosure to the Gaming Division under La. R.S. 27:70(C), holding:

> The import of this unique statutory duty is paramount. The legislature obviously had great concern about the integrity of the licensing process. As such, the legislature placed dual duties on the applicants and licensees, first a duty to be honest and complete in the initial representations, and second, a continuing duty to disclose any dishonest or fraudulent misrepresentation which continues until the disclosure.

[emphasis added.] *Capitol House,* 725 So.2d at 529, FN8. In the trial below, the jury expressly found that Jazz/Argosy knowingly violated its continuing duty to disclose violations of the Riverboat Act under La. R.S. 27:70(C).

Louisiana courts have uniformly held the gaming industry must be strictly regulated and that gaming agencies must strictly apply the rules enacted by the legislature in the Riverboat Act. In *Metro Riverboat Associates, Inc. v. Louisiana*

Gaming Control Bd., 761 So.2d 694, 700 (La.App. 1st Cir. 5/12/00), the court held:

> The legislature's intent that the gaming industry be strictly regulated is clearly set forth in La. R.S. 27:2. . . . The Board's actions in this instance are certainly not indicative of a strict adherence to the gaming laws. If this type of transaction is allowed to occur, the policies and regulations that were established by the legislature "to protect the general welfare of the state's people by keeping the state free from criminal and corrupt elements" will be rendered meaningless. See La. R.S. 27:2. The gaming industry, which already operates under a cloud of suspicion, could become even more inundated with "criminal and corrupt elements" as these entities would be able to do indirectly what they could not do directly, i.e., acquire an interest in a licensee without first submitting an application and being found suitable to hold such an interest. The [Gaming] Board cannot be allowed to circumvent the policies and procedures that were established by the legislature to prevent this very type of behavior from occurring.

Louisiana courts recognize License applicants and Licensees must strictly adhere to the gaming laws by

the subject to the Riverboat Act; otherwise, the public policies of the Riverboat Act are imperiled.

In *West*, the court upheld the denial of an application for a gaming employee permit under La. R.S. 27:70(A)(1) and La. R.S. 27:76(A)(2) (A-65, A-67] for failing to disclose a material fact sought in a gaming application, holding:

> The application was clear in its instructions. It was clear on the scope of the information sought. For the gaming industry in Louisiana to achieve and maintain a reputation for fair dealing, employees and employers must be held to the rules and standards enacted by the legislature.

West v. State ex rel. DPS, 763 So.2d 656, 658 (La.App. 1st Cir. 12/28/99). Jazz/Argosy committed the same conduct that resulted in the denial of a gaming application in *West*. A-51 to A-53.

The jury found that Jazz/Argosy "knowingly and intentionally made materially false, untrue and/or misleading representations in their application for a license" in violation of the Riverboat Act. A-51. Under La. R.S. 27:76(A)(2), the Gaming Division "***shall not*** award a license" based on the "[f]ailure of the applicant to provide information and documentation to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria." A-67.

Moreover, it was a crime to "knowingly or intentionally make a material false statement in any application for a license to conduct gaming activities" under La. R.S. 27:99(A). A-67.

In *California Motor Transport*, this Court made it clear that the right to petition is not "immunized" when used in violation of a valid statute. *Id.*, 404 U.S. at 513-514. In the present case, the jury found that the Jazz/Argosy's conduct violated the Riverboat Act and violated the Louisiana Unfair Trade Practices Law. A-51 to A-52. An act violates the Louisiana Unfair Trade Practices Law when the act offends public policy or when it involves fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct. *Capitol House,* 725 So.2d at 529-530. Therefore, the illegal acts of Jazz/Argosy are not protected by the First Amendment and are not protected under the *Noerr-Pennington* doctrine; and the Louisiana court erred to hold otherwise.

Moreover, the jury found Jazz/Argosy violated the "prescribed procedures" of the Gaming Division by violating the Riverboat Act, including the continuing duty of full disclosure set forth in La. R.S. 27:70(C). A-51 to A-52. Jazz/Argosy concealed economic interests and ownership interests in Jazz, which were expressly required to be disclosed in the License application. As a result of the violations of these "prescribed procedures", Jazz/Argosy abused the License process, frustrated the well-defined policies of the Riverboat Act, and prevented the Gaming Division from rendering an informed and

correct decision on the suitability of the Jazz/Argosy and its principals.

In *California Motor Transport*, this Court held that "the administrative and judicial processes have been abused" when the "abuse of those processes produced an illegal result" [404 U.S. at 513] and, further, "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful" [404 U.S. at 515]. By receiving a License in violation of the Riverboat Act, Jazz/Argosy's successful scheme to defraud the Gaming Division achieved the "illegal result" through the abuse of the Gaming Division's License process, which is conduct not protected by the *Noerr-Pennington* doctrine under *California Motor Transport*.

After reviewing the *Noerr-Pennington* jurisprudence, the Louisiana supreme court recently observed "the extension of *Noerr-Pennington* beyond antitrust cases by lower courts is based solely on First Amendment considerations." *Astoria*, 12 So.3d at 966, citing *Cardtoons, L.C. v. Major League Baseball Players*, 208 F.3d 885, 889 (10th Cir. 2000). The plaintiff in *Astoria* alleged that it was not awarded a license to operate a riverboat casino due to the defendants' corrupt practices which permeated the riverboat gaming licensing process in Louisiana, caused by the illegal payments made by License applicants to former Governor Edwin Edwards to influence the License approval process. *Astoria*, 12 So.3d at 958-959.

After reviewing the contours of immunity applicable under the First Amendment analysis, the court held at *Astoria*, 12 So.3d at 967, as follows:

> Whereas the right to petition granted by the First Amendment is not absolute, we find no reason to give the defendants' illegal actions First Amendment constitutional protection. In our view, while the Supreme Court has chosen to cast a wide net of protection afforded by *Noerr-Pennington*, this net should not be expanded to protect illegal activity, especially in claims that arise outside of the scope of antitrust laws.

[emphasis added.] Under the *Astoria* rationale, the illegal acts of Jazz/Argosy are not entitled to the protection of the *Noerr-Pennington* doctrine, which is consistent with *California Motor Transport*; however, the lower court here improperly held to the contrary. Note the different results reached by the Louisiana supreme court in *Astoria* and the state appellate court; this conflict highlights the need for this Court to provide guidance to courts on how to apply the *Noerr-Pennington* doctrine.

This Court has held that "a violation of the antitrust laws has been established" when a party seeks to "eliminate an applicant as a competitor by denying him free and meaningful access to the agencies." *California Motor Transport*, 404 U.S. at 515. Jazz/Argosy used knowing and willful

misrepresentations to obtain a License in violation of the Riverboat Act--a License the jury found should have been issued to Petitioner. A-51 to A-53. Jazz/Argosy's intentional use of misrepresentations and illegal conduct corrupted and abused the License process of the Gaming Division and deprived Petitioner, its competitor, of "free and unlimited access" to the Gaming Division's License application process. Under the rationale set forth in *California Motor Transport*, Jazz/Argosy's illegal conduct is not entitled to protection under the *Noerr-Pennington* doctrine.

In this case, the lower court radically expanded the reach of the *Noerr-Pennington* doctrine to protect illegal activity by holding that only criminal activity is outside the protection of the *Noerr-Pennington* doctrine, as follows:

> To the extent that the tort claims could be considered outside of the antitrust context, we find that Capitol House has not met its burden of showing that the defendants' acts rose to the level of criminality to satisfy the standard set forth by the [Louisiana Supreme Court] in *Astoria* . . .

[emphasis added.] A-38. Given the clear holding in *California Motor Transport* that the right to petition is not "immunized" when used in violation of a valid statute (*Id.*, 404 U.S. at 513-514), *i.e.* illegal activity, the Louisiana court improperly extended the *Noerr-Pennington* doctrine to immunize the illegal acts of

Jazz/Argosy, which violated the Riverboat Act and the Louisiana Unfair Trade Practices Law. A-51 to A-52.

This Court should grant this petition to reverse the Louisiana court's radical extension of the *Noerr-Pennington* doctrine, beyond rights protected under the First Amendment, to immunize illegal acts and acts in violation of the agency's "prescribed procedures" perpetrated in an agency's adjudicatory process, which conflicts with the relevant decision of this court rendered in *California Motor Transport*.

CONCLUSION

For the above reasons, Petitioner respectfully requests its Petition For Writ of Certiorari be granted so this Court can answer the question left open in *PRE* and hold that intentional misrepresentations and illegal activity in an adjudicatory setting is not protected by the First Amendment or the *Noerr-Pennington* doctrine.

Respectfully Submitted,

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Preservation Company, LLC

Dated: May 12, 2010

APPENDIX A

THE SUPREME COURT OF
THE STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.
VS. NO. 2009-C-2638

PERRYMAN CONSULTANTS, INCORPORATED; MR. M. RAY PERRYMAN, XYZ INSURANCE COMPANY AND TUV INSURANCE COMPANY

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IN RE: Capitol House Preservation Company, L.L.C.; - Plaintiff; Applying For Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, No. 418,525; to the Court of Appeal, First Circuit, No. 2008 CA 0367;

- - - - - -

February 12, 2010

Denied.

JTK
BJJ
JLW
GGG
MRC

WEIMER, J., recused.

Supreme Court of Louisiana
February 12, 2010

/s/
Deputy Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
2008 CA 0367

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

VERSUS

PERRYMAN CONSULTANTS, INCORPORATED; MR. M. RAY PERRYMAN, XYZ INSURANCE COMPANY AND TUV INSURANCE COMPANY.

- - - -

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE, LOUISIANA, DOCKET NO. 418,525, SECTION 23, HONORABLE WILLIAM A. MORVANT, JUDGE PRESIDING.

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CHARLES S. LAMBERT, JR., DANIEL D. HOLLIDAY, III, JEFFREY T. NICHOLS, Attorneys for Plaintiff-Appellee/Appellant Capitol House Preservation Company, L.L.C.

FREDRICK R. TULLEY, MARC S. WHITFIELD, EDWARD D. HUGHES, TOM S. EASTERLY, TAYLOR, PORTER, BROOKS & PHILLIPS LLP, H. ALSTON JOHNSON, III, PHELPS DUNBAR LLP, Attorneys for Defendants-Appellants/Appellees Argosy Gaming Co., Argosy of

Louisiana, Inc., Catfish Queen Partnership in Commendam, and Jazz. Enterprises, Inc.

Judgment rendered: August 28, 2009.

Before: PARRO, PETTIGREW, and WELCH, JJ.

Pettigrew, J. concurs and assigns reasons

PARRO, J.

Defendants, Argosy Gaming Company, Argosy of Louisiana, Inc., Catfish Queen Partnership in Commendam, and Jazz Enterprises, Inc., appeal the final judgment entered in conformity with a jury verdict awarding damages to Capitol House Preservation Company, L.L.C. (Capitol House) arising from the defendants' alleged misrepresentations and omissions made in pursuit of a riverboat gaming license. Capitol House has answered the appeal, asserting that the trial court erred in denying recovery to it for lost profits and in striking the damages the jury awarded to it for the cost of money it had borrowed in furtherance of its proposed riverboat gaming project. For the following reasons, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, the Riverboat Gaming Enforcement Division of the Gaming Enforcement Section of the Office of State Police (the Division) had issued all but two of the 15 riverboat casino licenses authorized by the Louisiana Riverboat Economic

Development and Gaming Control Act (Riverboat Gaming Act).[1] Three groups filed applications for the two remaining licenses, which were earmarked for Baton Rouge: 1) Lady Luck Baton Rouge, Inc. (sometimes referred to as "Lady Luck" or "Lady Luck Baton Rouge"); 2) Jazz Enterprises, Inc. (Jazz) and Argosy Gaming Company (sometimes referred to collectively as "Jazz/Argosy"), which formed Catfish Queen Partnership in Commendam (Catfish Queen)[2] and submitted a joint application as Jazz/Catfish Queen; and 3) Louisiana Casino Cruises, Inc. (LCC). The Division ultimately determined that all three applicants were suitable for a license.

The Division hired Perryman Consultants, Inc. to rank the applicants according to the economic impact that each would have on the local and state economies if awarded a license. It ranked the Jazz/Argosy project first by a considerable margin, the LCC project second, and the Lady Luck project third. On July 18, 1994, after conducting hearings on July 7, 8, and 11, 1994, in which each applicant was afforded an opportunity to make a separate presentation, the Division awarded the licenses to Jazz/Argosy and LCC and denied Lady Luck's application for a license.[3] The Division subsequently issued supplemental reasons for the denial of Lady Luck's license. Lady Luck, which was owned by Lady

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[1] See former LSA-R.S. 4:525, which was redesignated as LSA-R.S. 27:65 by 1996 La. Acts, No. 7, § 3, 1st Ex. Sess.

[2] Argosy Gaming Company, had a 90 percent ownership interest in Catfish Queen and Jazz had a 10 percent ownership interest in Catfish Queen.

[3] All citations to substantive laws throughout this opinion will be to those versions of such laws in effect as of July 18, 1994.

Luck Gaming Corporation and Capitol House, did not appeal the Division's denial of its license.

On July 10, 1995, Capitol House, as the successor-in-interest to Lady Luck, filed the instant suit in the 19th Judicial District Court against Perryman Consultants, Inc., and its president, Dr. Ray Perryman (sometimes collectively referred to as "Perryman"), alleging that Perryman committed numerous errors and omissions in ranking the applicants. On November 26, 1997, Capitol House amended its petition to name Jazz, Catfish Queen, Argosy Gaming Company, Argosy of Louisiana, Inc., and shareholders and principals of Jazz, including Steve Urie, Lodging Systems, Inc., Ronald Johnson, Mark Bradley, and Paula Bradley, as defendants. Capitol House asserted claims of negligence and violations of the Louisiana Unfair Trade Practices and Consumer Protection Law (UTPL), LSA-R.S. 51:1401, *et seq.* See LSA-R.S. 51:1409(A). Specifically, Capitol House alleged that Jazz and its principals made false and misleading statements to persons involved in the selection process regarding, among other things, the true ownership of Jazz and Jazz's ability to finance and complete various landside improvements it promised.

Capitol House averred that Jazz's material misrepresentations to the Division violated the Riverboat Gaming Act and disqualified Jazz from consideration for a license. Moreover, Capitol House asserted that the City of Baton Rouge's support for the Jazz project, the issuance of a certificate by the Louisiana Riverboat Gaming Commission (the

Commission), the Perryman rankings, and the Division's decision to issue a license were all based on Jazz's fraudulent and deceptive practices and representations. Capitol House alleged that Jazz, as a result of these representations, obtained an unfair and undue competitive advantage. Capitol House sought to recover the loss of its investments spent pursuing the license, the value of a gaming license, lost profits, and future lost profits of its business and riverboat project, as well as attorney fees and costs.

This case has an extensive procedural history and this court has written four prior opinions on appeal in this matter. In *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc.*, 98-1514 (La. App. 1st Cir. 12/10/98), 725 So.2d 523, *writ denied*, 99-0548 (La. 4/9/99), 740 So.2d 637 (*Capitol House I*), this court upheld the trial court's denial of a prescription exception as to the individual defendants, finding that the Riverboat Gaming Act imposed a continuing duty to report violations of the Act, and that each day the defendants, as licensees or applicants, failed to disclose the alleged misrepresentations, a new violation of the statutory duty arose and could constitute an unfair trade practice should the court so find. In *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc.*, 98-2216 (La. App. 1st Cir. 11/5/99), 745 So.2d 1194, *writ denied*, 99-3446 (La. 2/11/00), 754 So.2d 937 (*Capitol House II*), this court reversed the granting of prescription exceptions, applying the continuing tort principle to find that the claims were not time barred against the remaining defendants.

In *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc.*, 01-2524 (La. App. 1st Cir. 12/31/02), 836 So.2d 680, *writs denied*, 03-0323 and 0324 (La. 4/21/03), 841 So.2d 794 and 795 (*Capitol House III*), this court upheld the trial court's denial of defendants' exceptions raising the objections of lack of subject matter jurisdiction and no cause of action. With regard to the exception raising the objection of lack of subject matter jurisdiction, the defendants had asserted that the trial court could not award damages to Capitol House, because it lacked original jurisdiction and authority to review the alleged misconduct and to determine whether applicants should have been awarded a riverboat license. This court disagreed, reasoning that the allegations in Capitol House's petition asserted a civil claim for monetary damages arising from the alleged misconduct of defendants. *Id.* at 684. As no gaming agency had been granted the authority to award money damages, this court found that the case fell within the adjudicative sphere of the trial court. *Id.* at 685. With regard to the exception raising the objection of no cause of action, the defendants had argued that Capitol House was precluded from contesting the Division's decision, because Capitol House had failed to exhaust administrative remedies provided for in the gaming law with respect to the denial of its license application. This court noted that the exhaustion doctrine applies only when exclusive jurisdiction exists in an administrative agency, and concluded that the doctrine did not apply to Capitol House's claims for monetary damages. *Id.*

Following this court's ruling in *Capitol House III*, the defendants filed exceptions raising the objection of res judicata, contending that Capitol House's claims were barred because all issues raised by Capitol House had been previously litigated and determined by the Division during the licensing process. Because Capitol House's predecessor, Lady Luck, had failed to appeal the Division's rulings, the defendants submitted that those rulings were final and definitive and could not be collaterally attacked in court. In support of their assertion that all of Capitol House's claims of misconduct were raised and addressed by the Division, the defendants introduced complaints lodged with the Division by Capitol House's predecessor, Lady Luck, the Division's final order, and its reasons for ruling, as well as the transcripts of the hearings held before the Division. The trial court granted the res judicata exceptions, which judgment was affirmed by this court. *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc.*, 03-1983, 03-1984 (La. App. 1st Cir. 11/3/04), 889 So.2d 304, 312 (*Capitol House IV*).

On writs, the Louisiana Supreme Court reversed this court's ruling, adopting the "reasons assigned by the dissenting judge." *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc.*, 05-0090, 05-0091 (La. 3/24/05), 897 So.2d 584. The dissent reasoned:

> First, although some of the issues in this lawsuit were raised at the licensing hearing before the Division, they were not

> litigated there. There was no opportunity for discovery, no filing of motions or exceptions, no cross-examination of witnesses for one party by representatives of another party, nor any of the other procedural aspects of a trial. Nor could there have been, as this court has previously held that at least some of the claims were in the nature of a continuing tort and, since no gaming agency was granted the authority to award money damages, those claims were beyond the jurisdiction of any such agency.
>
> Second, even though LSA-R.S. 13:4231 now includes collateral estoppel, relitigation of the same issue is only precluded when the previous action was between the same parties. That aspect of res judicata has not changed. The licensing hearings were between each separate applicant and the Division, not between one applicant and another. Therefore, the licensing process and decision cannot be res judicata as to the issues raised between these parties in this case.

Capitol House IV, 889 So.2d at 311-12.

This matter then proceeded toward trial. During the pre-trial process, the trial court granted the defendants' motion for partial summary judgment, finding that the Riverboat Gaming Act

precluded Capitol House from recovering any damages based upon the value of the license or the lost profits that would have been earned had the license been awarded. The trial court limited Capitol House's damages to lost investments and expenses incurred in pursuit of the license. Before trial, Dr. Ray Perryman was dismissed through an exception raising the objection of res judicata. Later, defendants Steve Urie, Lodging Systems, Inc., Ronald Johnson, Mark Bradley, and Paula Bradley were voluntarily dismissed.

Capitol House proceeded to trial against the remaining defendants, Argosy Gaming Company, Argosy of Louisiana, Inc., Catfish Queen, and Jazz. The case was tried for eleven days to a jury, which rendered a verdict for Capitol House against all defendants in the amount of $3,823,786, consisting of $1,356,953 in costs incurred by Capitol House during the time period leading up to the denial of the license, as well as $2,671,000 of interest accrued from 1993 to the present on loans to Capitol House made by its member, Charles Lambert, Sr., and his brother, Laurence Lambert.[4] The jury found that the defendants violated the Riverboat Gaming Act by making material misrepresentations or omissions and that those violations constituted unfair and deceptive trade practices. It concluded that the Division would have denied defendants' application for a gaming license had it been aware of the misrepresentations. The jury also found that Lady Luck would have been awarded a license had the defendants not received one.

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[4] The interest award was subject to a credit of $204,167.

Thereafter, the defendants filed a motion for judgment notwithstanding the verdict, asserting that the $2,671,000 interest award was not supported by the evidence as it was not documented by any note or loan agreement to Capitol House by either Charles Lambert, Sr. or Laurence Lambert. The trial court granted post-trial relief to the defendants by striking the conventional interest award. The final judgment signed on September 27, 2007, awarded Capitol House $1,356,953, together with judicial interest from the date of judicial demand, plus costs and attorney fees. Defendants timely sought and were granted a suspensive appeal. Capitol House has timely filed an answer to the defendants' appeal.

BANKRUPTCY PROCEEDINGS AND THE AUTOMATIC STAY

On May 27, 2008, Capitol House notified this court that Argosy of Louisiana, Inc., Catfish Queen, and Jazz had commenced voluntary Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the District of Delaware on May 5, 2008. Capitol House then filed a motion to sever and stay the appeal as to the bankrupt defendants. We note that 11 U.S.C.A. § 362(a)(1) extends the automatic stay provision only to the debtors filing bankruptcy proceedings and not to non-bankrupt co-debtors. See *Martin v. David*, 95-1411 (La. App. 3rd Cir. 12/7/95), 666 So.2d 1136, 1137. Therefore, we recognize the automatic stay pursuant to 11 U.S.C.A. § 362(a)(1) as it applies to

Argosy of Louisiana, Inc., Catfish Queen, and Jazz, and we are prohibited from deciding the issues presented on appeal as it relates to those parties until such time as the automatic stay has been lifted; however, no stay is in effect as to Argosy Gaming Company.[5] Because we are without authority to address any issue relative to the bankrupt defendants, we grant Capitol House's motion, sever the appeal as to the bankrupt defendants, and stay that matter. We also grant Capitol House an indefinite extension of time to file a reply brief as to the bankrupt defendants, to expire ten (10) days after Capitol House receives notice that the automatic stay has been terminated as to those defendants. Moreover, we grant Capitol House's motion to file its reply brief as to Argosy Gaming Company only. Accordingly, we limit the scope of our review in the underlying appeal to the defendant Argosy Gaming Company (Argosy).

ASSIGNMENTS OF ERROR

In this appeal, Argosy has presented the following assignments of error:

1. The defendants' conduct in petitioning the Division and advocating for issuance of a gaming license is immune from attack under the UTPL pursuant to the *Noerr-Pennington*

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[5] Beyond the automatic stay provisions of 11 U.S.C.A. § 362(a)(1) we note that 11 U.S.A. § 105(a) authorizes the bankruptcy court to stay proceedings against non-bankrupt defendants, but there is no evidence that the bankruptcy court has granted a stay in favor of Argosy Gaming Company.

and *Parker v. Brown* federal antitrust immunity doctrines.

2. The trial court erred as a matter of law by not dismissing, on the basis of primary jurisdiction and failure to exhaust administrative remedies, that portion of plaintiffs claim that sought to overturn the licensing decisions and findings that were within the exclusive jurisdiction of the gaming regulators.

3. Capitol House failed to prove that the defendants were disqualified from receiving a gaming license, that Lady Luck Baton Rouge was qualified, and that Capitol House was damaged by the denial of Lady Luck Baton Rouge's license application.

4. The trial court erred as a matter of law by failing to dismiss Capitol House's claims on the grounds that defendants did not violate the UTPL, because the defendants were not engaged in "trade" or "commerce" as required under the UTPL.

Capitol House has answered the appeal and has presented the following assignments of error:

1. The trial court committed legal error by ruling that plaintiff could not recover lost profits due to the fraudulent and unlawful acts of the defendants as an element of damages under the UTPL or under LSA-C.C.

art. 2315, thereby limiting plaintiffs recovery to out-of-pocket expenses incurred in the furtherance of its business.

2. The trial court committed legal error by striking the damages the jury awarded the plaintiff for the cost of money borrowed by plaintiff in furtherance of its proposed riverboat project and business, including $871,000 in accrued interest owed by plaintiff to Laurence Lambert.[6]

DISCUSSION

In its first assignment of error, Argosy asserts that the defendants' conduct is immune from attack under the UTPL pursuant to the *Parker* and *Noerr-Pennington* immunity doctrines applicable in federal antitrust cases. The UTPL is a form of state antitrust statute patterned after the Federal Trade Commission Act, 15 U.S.C.A. § 41, et seq. See *First Financial Bank, FSB v. Butler*, 492 So.2d 503, 505 (La. App. 5th Cir. 1986). The UTPL prohibits the same types of deceptive and anticompetitive conduct prohibited by the Federal Trade Commission Act. See LSA-R.S. 51:1405(A) and 15 U.S.C.A. § 45(a)(1). However, the UTPL permits "[a]ny conduct which complies with section 5(a)(1) of the Federal Trade

[6] Capitol House also asserted that the trial court committed legal error in striking the accrued interest allegedly owed by Capitol House to Charles S. Lambert, Sr., but Capitol House has not addressed that assignment of error in its brief provided to this court, so we consider that issue abandoned. See Uniform Rules of Courts of Appeal 2-12.4.

Commission Act [15 U.S.C.A. § 45(a)(1)]," as well as "any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations." LSA-R.S. 51:1406(4). Therefore, in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have applied the Federal Trade Commission Act to various types of conduct.[7] Among the antitrust law defenses recognized by the federal courts are the related *Parker* and *Noerr-Pennington* immunity doctrines, which have evolved from a series of United States Supreme Court cases interpreting the Sherman Antitrust Act, 15 U.S.C.A. § 1, et seq.[8]

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the United States Supreme Court held that the Sherman Act does not reach anticompetitive effects produced by official state

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[7] See also *Guste v. Deniars*, 330 So.2d 123, 125 (La. App. 1st Cir. 1976), wherein this court, noting the similarities between the UTPL and the federal statute, indicated that "we may and should consider interpretations of the Federal courts and of the Commission relative to such similar statutes to adjudge the scope and application of our own statute."

[8] The Sherman Act was adopted to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. *D.R. Wilder Mfg. Co. v. Corn Product Refining Co.*, 236 U.S. 165, 173-74, 35 S.Ct. 398, 401, 59 L.Ed. 520 (1915). The Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act. *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 393, 394,73 S.Ct. 361, 363, 97 L.Ed. 426 (1953).

action. The Supreme Court, assuming that the regulatory program before it would violate the Sherman Act if it were organized and made effective by private persons, validated the state's actions implementing the regulatory program because:

> It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

Parker, 317 U.S. at 350-51, 63 S.Ct. at 313. Argosy is clearly afforded no protection under the Parker doctrine, insofar as it protects state action in promulgating and enforcing anti-competitive legislation or rules.

Whereas the *Parker* doctrine applies to protect state action in governing anticompetitive regulation, the *Noerr-Pennington* doctrine applies to protect private persons' efforts to procure governmental action. The *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government. *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140, 119 S.Ct. 1031, 143 L.Ed.2d 40 (1999). The *Noerr-Pennington*

doctrine applies to antitrust actions premised on state law. *Video Intern. Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied sub nom., City of Dallas v. Video Intern. Production, Inc.*, 490 U.S. 1047, 109 S.Ct. 1955, 104 L.Ed.2d 424, and *cert. denied*, 491 U.S. 906, 109 S.Ct. 3189, 105 L.Ed.2d 697 (1989). Recently, the Louisiana Supreme Court has recognized that the doctrine can apply to actions brought under the UTPL. *Astoria Entertainment, Inc. v. DeBartolo*, 08-1690 (La. 5/22/09), ___ So.3d ___, 2009 WL 1425837.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961), the United States Supreme Court held that the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws, even where railroads disparaged trucking companies to customers and the general public, because such disparagement was "incidental" to petitioning the government to adopt laws allegedly destructive to the trucking business. Thereafter, the Supreme Court indicated that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent [or] purpose." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965). Accordingly, efforts to influence public officials will not subject individuals to liability, even when the sole purpose of the activity is to drive competitors out of business. *Id.*

In *Noerr*, the court also recognized what has become known as the "sham" exception. Under the "sham" exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533. The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, and not a defendant who "genuinely seeks to achieve his governmental result, but does so *through improper means*" *Id.* The "sham" exception is inapplicable here, because the defendants, in attempting to obtain a gaming license, sought to procure favorable governmental action and were not attempting to interfere directly with the business relationships of their competitors.

The United States Supreme Court has also indicated that there is the possibility of a misrepresentation exception to the *Noerr-Pennington* immunity doctrine when the misrepresentations are made in less political arenas. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972) ("[misrepresentations, condoned

in the political arena, are not immunized when used in the adjudicatory process"), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988) ("[b]ut in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations"). Moreover, in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174, 86 S.Ct. 347, 349, 15 L.Ed.2d 247 (1965), the court concluded, without addressing or applying the *Noerr-Pennington* doctrine, that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present."

The federal Fifth Circuit has also recognized that material misrepresentations made to government decision makers outside of the political arena are not protected by the *Noerr-Pennington* doctrine. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), the court held that the *Noerr-Pennington* doctrine did not protect the defendant producers' filing of false production forecasts with a state regulatory commission. The forecasts were submitted by the producers themselves and the commission relied on the forecasts to set production limits. The Fifth Circuit noted that there was no opportunity for meaningful supervision or verification of the forecasts and they were adopted by the commission at "face value." *Id.* at 1295. The

Fifth Circuit stated that the *Noerr-Pennington* doctrine seeks to protect attempts to influence policies and held that "the abuse of the administrative process here alleged does not justify antitrust immunity." *Id.* at 1298. The court drew a distinction between seeking to influence government policy versus seeking to undermine the policy altogether, noting as follows:

> The germination of the allowable formula was political in the [Noerr] sense, and thus participation in those rulemaking proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anticompetitive purposes.
> *Id.* at 1297.[9]

Argosy contends that more recent jurisprudence from the United States Supreme Court has significantly narrowed, if not closed altogether, any exception to Noerr-Pennington for fraudulent or

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[9] Similarly, in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, the court indicated that misrepresentations made in an administrative-type proceeding are not protected by the Noerr-Pennington doctrine, but found that the allegations in the complaint were insufficient to avoid dismissal. Likewise, in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), the court found that neither Noerr-Pennington nor the First Amendment protects the conduct plaintiffs alleged therein—namely, knowing misrepresentations to state securities administrators and a federal court.

unlawful conduct, including the exception recognized by the Fifth Circuit in *Woods Exploration*. In *Omni*, the Supreme Court indicated that it recognized the sham exception to Noerr-Pennington, but it would not recognize a conspiracy exception to the doctrine. The Supreme Court concluded that "with the possible market participant exception, any action that qualifies as state action is '*ipso facto* ... exempt from the operation of the antitrust laws.'" *Omni*, 499 U.S. at 379, 111 S.Ct. at 1353. Argosy contends that Omni stands for the proposition that the Supreme Court disfavored any across-the-board fraud exception. Argosy argues that so long as the sham exception is not applicable, it is immune from liability under the Noerr-Pennington doctrine.

Although *Omni* reflects the United States Supreme Court's reluctance to carve out any additional exceptions to *Noerr-Pennington* immunity, we disagree that *Omni* necessarily limited the Fifth Circuit's holding in *Woods Exploration* insofar as *Omni* involved a party's efforts to influence the passage of zoning ordinances and did not involve any misrepresentations made to influence the administration of an existing rule or ordinance. Additionally, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (PREI), which was decided after *Omni*, the Supreme Court, after providing a two-part test designed for "sham" litigation, explicitly declined to decide whether immunity from liability would include situations where the litigant had perpetrated "fraud" or had made "other misrepresentations." *PREI*, 508

U.S. at 61 n.6, 113 S.Ct. at 1929 n.6. Although given the opportunity to do so, the Supreme Court in *PREI* did not foreclose a misrepresentation or fraud exception to the Noerr-Pennington immunity doctrine when the misrepresentation or fraud occurred outside of the political arena.[10]

Recently, in *Astoria*, 08-1690 at p. 10, the Louisiana Supreme Court, noting that the United States Supreme Court "has chosen to cast a wide net of protection afforded by *Noerr-Pennington*" declined to extend the immunity to "protect illegal activity, especially in claims that arise outside of the scope of antitrust laws." Therein, Astoria Entertainment, Inc. (Astoria), an applicant for a riverboat casino license, filed an action against two other applicants, Edward J. DeBartolo, Jr. and Robert Guidry, alleging that it was not awarded a license due to those defendants' corrupt practices in, among other things, making illegal payments to former Governor Edwin Edwards in order to obtain Edwards' assistance in having a casino license awarded to each of them. The defendants filed motions for summary judgment contending that their actions in seeking the licenses were protected by the immunity afforded under the *Noerr-Pennington* doctrine. The Louisiana Supreme Court found that the case fell outside of the scope of the antitrust laws and noted that the United States

[10] Moreover, the United States District Court for the Eastern District of Louisiana, in a case addressing the interplay between Louisiana's regulation of casino gaming and the *Noerr-Pennington* and *Parker* doctrines, recently recognized the fraud exception as enunciated in *Woods Exploration*, but found it inapplicable therein. See *Jebaco, Inc. v. Harris Operating Co., Inc.*, 2008 WL 638618 (E.D. La. 2008).

Supreme Court has never addressed the *Noerr-Pennington* doctrine outside of the antitrust context. The Louisiana Supreme Court further noted that the extension of *Noerr-Pennington* protection beyond antitrust cases by lower courts is based solely on the right to petition under the First Amendment, and those courts have eliminated the *Noerr-Pennington* doctrine's first rationale for immunity—an interpretation of the Sherman Act. *Id.* at 9, The Louisiana Supreme Court found no reason to give the defendants' illegal acts of bribery and corruption First Amendment constitutional protection, because those acts arose "outside of the scope of antitrust laws." *Id.* at 10. As such, the court found that the defendants' motions for summary judgment were improperly granted insofar as their acts were not immunized under Noerr-Pennington. *Id.*

Capitol House contends that *Astoria* is directly on point and should preclude the defendants from claiming Noerr-Pennington immunity arising from their alleged criminal acts. Capitol House notes that the trial court, in its jury instructions, identified the elements of the "crime of false statements relating to gaming" as set forth in former LSA-R.S. 4:558.[11] Capitol House also notes that the jury found that the defendants "knowingly and intentionally made materially false, untrue and/or misleading representations in their application for a license in

[11] Louisiana Revised Statute 4:558 was redesignated as LSA-R.S. 27:99 by 1996 La Acts, No. 7, § 3, 1st Ex. Sess. and later repealed by 2001 La Acts No. 1222, § 2, effective July 2, 2001. The latter act also enacted LSA-R.S. 27:30, a provision substantially similar to LSA-R.S. 27:99.

violation of the [Riverboat Act]." Given the severe penalties provided in former LSA-R.S. 4:558(B), Capitol House submits that the crime of submitting false statements in a license application is an illegal act and a serious criminal offense. As such, Capitol House concludes that under the rationale of *Astoria*, the Noerr-Pennington doctrine affords the defendants no protection arising from the criminal act of providing false statements in applying for their gaming license.

In *Astoria*, the Louisiana Supreme Court indicated that it would not expand the Noerr-Pennington doctrine to protect illegal activity, "***especially in claims that arise outside of the scope of antitrust laws***" (Emphasis added.) *Id*, at 10. We note, however, that the primary claims asserted by Capitol House against the defendants arise under the UTPL. To the extent these claims fall under Louisiana's antitrust statute, LSA-R.S. 51:1406(4) requires that we follow "adjudicated court decision[s] interpreting the provisions of [the Federal Trade Commission Act]."

The federal Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 890 (10th Cir. 2000), *cert. denied*, 531 U.S. 873, 121 S.Ct. 175, 148 L.Ed.2d 120 (2000), discussed the difference between immunity afforded under the Noerr-Pennington doctrine arising in the antitrust realm as opposed to immunity that does not fall within the antitrust context and is based solely on First Amendment grounds. In that case, the court noted that the purpose of the Noerr-Pennington

doctrine as applied in areas outside of the antitrust field is the protection of the right to petition. *Id.* at 889-90.[12] Although the right to petition is guaranteed, the right to petition is not an absolute protection from liability for the actions of the person exercising one's right to petition. *Id.* at 891. Rather, the First Amendment's right to petition does not grant immunity from suit for one's actions and it protects from being enjoined only those petitions which are made to "the Government." *Id.* at 892. In determining whether the person who exercised his right to petition is liable for his actions, a court must determine whether that petitioner violated the law. *Id.* at 890 n.4. By contrast, antitrust cases that grant Noerr-Pennington immunity do so based upon *both* the Sherman Act and the right to petition. *Id.* at 890. Noerr-Pennington immunity is immunity from all liability, and a defendant is immune from liability based upon a simple showing of objective reasonableness. *Id.* at 890 n.4. The court further cautioned about drawing constitutional principles from propositions founded upon construction of antitrust statutes. *Id.* at 891. Because the underlying case in this appeal arises under the UTPL, we must consider the immunity afforded under Noerr-Pennington in the context of the antitrust framework.

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[12] The court also indicated that it is a bit of a misnomer to refer to the right to petition as the *Noerr-Pennington* immunity doctrine in a non-antitrust case. Rather, it is more appropriate to refer to the immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. *Id* at 889.

Misrepresentations, condoned in the political arena, are not necessarily immunized when used in the adjudicatory process. *California Motor Transport Co.*, 404 U.S. at 513, 92 S.Ct. at 613. The alleged material misrepresentations in the underlying case were not designed to influence policy but rather to purportedly undermine the means of effectuating that policy. Such alleged abuse of the administrative process does not justify antitrust immunity if defendants' alleged misrepresentations subverted the entire decision-making process to the extent that the Division was effectively no longer the real decision maker. See *Woods Exploration*, 438 F.2d at 1295; see also *Kottle*, 146 F.3d at 1063 (if misrepresentations made by defendant were of such a magnitude that the "entire [administrative] proceeding was deprived of its legitimacy," then the sham exception to *Noerr-Pennington* would apply), and *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123 (3rd Cir. 1999), *cert. denied*, 528 U.S. 871, 120 S.Ct. 173, 145 L.Ed.2d 146 (1999) (material misrepresentations that "infect the core" of the defendant's claim and the government's resulting actions are not entitled to *Noerr-Pennington* immunity). On the other hand, in a case involving the "conceded presence ... of disinterested decision makers, an independent investigation, an open process, and extensive opportunities for error correction," the federal Third Circuit has affirmed, after consideration of the *Noerr-Pennington* doctrine, the dismissal of a lawsuit even though misrepresentations were made when an agency was acting judicially. *Armstrong Surgical Ctr., Inc. v. Armstrong County Memorial Hosp.*, 185 F.3d 154,

164 (3rd Cir. 1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2716, 147 L.Ed.2d 982 (2000).[13]

The application of the *Noerr-Pennington* immunity doctrine is a question of law. See *IGEN Intern., Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003). As such, when addressing the Noerr-Pennington doctrine, a reviewing court conducts a de novo review of questions of law and renders a judgment on the record. See *James Const. Group, L.L.C. v. State ex rel. Dept. of Transp. and Dev.*, 07-0225 (La. App. 1st Cir. 11/2/07), 977 So.2d 989, 993. Accordingly, in order for Capitol House to have a viable claim under the UTPL that is not otherwise precluded under the *Noerr-Pennington* immunity doctrine, Capitol House must show that the defendants' misrepresentations with regard to these issues subverted the entire decision-making process to the extent that the Division was effectively no longer the real decision maker. See *Woods Exploration*, 438 F.2d at 1295.

Capitol House submits that the evidence it presented at trial shows that Argosy would have been denied the license had the defendants not abused the administrative process and had the misrepresentations been known to the Division prior to the award of the license. In particular, Capitol House avers that it showed that the defendants: 1) concealed that Urie had a substantial ownership

[13] The majority in *Armstrong* distinguished the Fifth Circuit's decision in *Woods Exploration*, 438 F.2d 1286, on the basis that the regulators played no role in reviewing or approving the false data submitted to the state by the defendant.

interest in Jazz, 2) failed to disclose contingent liabilities or agreements worth $3,2000,000, and 3) misrepresented Jazz's ability to finance and build landside developments and, when Argosy acquired all of the shares of Jazz, performed a "bait and switch" scheme to defraud.

The Riverboat Gaming Act provided that the Division "shall not award a license or permit to any person" who is disqualified on the basis of a failure "to provide information and documentation to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria."[14] On July 30, 1993, Jazz and Catfish Queen submitted a joint application (Application) for a license to the Division. The Application provided: "Disclosure of the information is REQUIRED. Failure to provide information could result in rejection or delay in processing this application." The Application required that all owners of 5 percent or more be listed. In the Application, Jazz represented that Johnson, its president, and Bradley, its vicepresident, each owned 50 percent of the company, while Urie was listed as a director of Jazz. As part of the Application, Jazz, through Johnson, submitted an "Affidavit of Full Disclosure" which stated "[t]hat, except as reported in Applicant's/my Application ('Application'), I have no agreement or understanding with any person or entity and no

[14] See former LSA-R.S. 4:536(A)(2), which was redesignated as LSA-R.S. 27:76(A)(2) by 1996 La. Acts, No. 7, § 3, 1st Ex. Sess. and later repealed by 2001 La. Acts, No. 1222, § 2, effective July 2,2001

present intent to hold as agent, nominee, or otherwise any interest in the Application." Additionally, the Application required that all contingent liabilities as well as all contracts or agreements pertaining to the gaming industry valued at $50,000 or more be disclosed. The defendants represented the value of all "Contingent Liabilities" as $0 in their Application. Jazz, through Johnson, executed a sworn "Verification" attesting "that the information contained in this Form is true, complete and accurate to the best of my knowledge and belief."

At trial, Capitol House contends it showed that Urie, who was not listed as an owner in the Application, concealed his ownership interest in Jazz during the licensing process. Capitol House called William R. Legier, a certified public accountant and a certified fraud examiner, to offer expert testimony on the evidence of ownership, fraud detection, and forensic accounting. Based upon a review of multiple documents obtained from the defendants through discovery, including Urie's individual returns, the corporate income tax returns, and corporate financial statements, Legier stated that Urie "had anywhere from a fifty to a seventy-five percent interest in Jazz from '93, February at least . . . until the sale of his stock." Legier testified that Johnson and Bradley, although listed as owners in the Application, "had no investment in the company, and they got very little out of it." Legier concluded that Urie owned Jazz during the entirety of the licensing process. Moreover, Capitol House points out that Urie himself testified that "the worst thing you can

do is be a supplier to casinos and then run a casino or to be part of the operations of a casino. So it was important that I not, particularly during the investigative stage, be a part of that, and we were very careful to make sure that I was distanced." Capitol House concludes that it showed that Urie was effectively the owner of Jazz during the licensing process.

Also, Colonel Keith Norris, Deputy Superintendent for the Louisiana State Police and an adviser to the Division, testified that if anyone did anything to conceal from us, "we would have hit them on the head with a hammer." Colonel Norris testified that if a party lied on its application in an attempt to deceive the Division or that it purposefully concealed ownership, then "it was over with for you." Similarly, Commander Terry Landry, who was involved with the licensing process during the presentation stage, testified that "[i]f the intent of the applicant was not to disclose all the partners, it very well could have been a one strike and you're out, or if it was an omission that wasn't intentional, it could have been an administrative fine." Based upon the foregoing testimony, Capitol House concludes that the defendants' failure to list Urie as an owner abused the administrative process to the extent that the defendants would not have been awarded a license had the Division known of Urie's ownership interest in Jazz prior to the licensing hearing.

However, we note that Capitol House raised the specific issue regarding Urie's ownership interest in

Jazz during the course of the licensing proceedings. The Division investigated this specific allegation and was apparently satisfied with its findings insofar as it nonetheless decided to issue a gaming license to Jazz/Argosy. Moreover, although Urie was not listed as an "Owner" in the Application, the evidence presented at trial indicated that the Division knew that Urie effectively controlled the ownership of Jazz insofar as ten months prior to the licensing hearing, the Division was informed that Urie held the option to buy 75 percent of Jazz for a nominal price. The Division was also aware that Urie was a principal in Jazz during the entirety of the licensing process insofar as he was listed as a "Director" in the Application. One of the main purposes for listing all principal officers, directors, partners, and stockholders was to allow the Division to perform background checks to make suitability determinations. The Division conducted the requisite background check on Urie as well as all other Jazz shareholders and determined that they were all suitable. The Division, after the license was granted, approved Urie's exercise of the option. Because the Division knew that Urie was a principal in, and effectively controlled, Jazz and because the Division performed the requisite background check on Urie, any alleged misrepresentation regarding Urie's ownership interest in Jazz did not subvert the Division's decision-making process.

Capitol House also contends that while the defendants indicated that they had no contingent liabilities worth at least $50,000, the evidence adduced at trial showed that the defendants failed to

disclose contingent liabilities or agreements worth more than $3,200,000. First, Capitol House contends that Jazz concealed that it owed $2,200,000 to Peter Wilday, the architect for the Jazz project.[15] Although Jazz, in its Application, did not list the $2.2 million amount due Wilday, we note that it is undisputed that the Division, prior to the award of the license, became aware that Jazz owed this amount to Wilday. As such, because the Division was aware of the amount owed to Wilday, the defendants' failure to list the amount owed in the Application did not subvert the underlying decision-making process.

At trial, Capitol House also showed that Jazz, Urie, Johnson, and Bradley executed a settlement agreement with Randy Hayden, Jazz's founder, in March 1993, which obliged Jazz to pay $50,000 to Hayden upon execution and to pay Hayden an additional $350,000 contingent upon a gaming license being issued to Jazz. Capitol House also showed that Jazz and Baton Rouge Gaming, Inc. (BRG) entered into an agreement on July 1, 1993, that provided if Jazz obtained a license and did not utilize BRG as its gaming operator, then Jazz would repay a $400,000 loan as well as an additional $250,000 to BRG. While the agreement between Jazz

[15] Wilday represented to the Division that he was "paid in full for [his] design and consulting services" rendered to Jazz and that he was paid $150,908.34. However, Capitol House notes that Jazz paid Wilday a total of $2,200,000 after Wilday represented to the Division that he was "paid in full." Additionally, Capitol House questions whether Wilday had an ownership interest in Jazz, but the evidence presented at trial falls short of evidencing any ownership agreement between Wilday and Jazz.

and Hayden should have been disclosed in the Application, we note that the settlement between Jazz and BRG was funded in the summer of 1993, or prior to the completion of the defendants' financial statement, so the settlement was arguably not required to be reported. Nevertheless, even assuming that both settlements should have been disclosed, Capitol House failed to show that their exclusion was intentional. Additionally, the amount of the financial non-disclosures paled in comparison to the size of the entire project. Lieutenant Marcal Poullard, a member of the Division who was responsible for conducting suitability investigations of applicants and made the final decision as to who received the licenses, testified that the failure to list all contracts of $50,000 or more could affect the suitability of the applicant, but that he would not determine a proper course of action on his own. Accordingly, given that the Division was vested with discretion to decide what level of undisclosed debt the Division considered material for its licensing decision and because the debt paled in comparison to the totality of the proposed project, we cannot conclude that the defendants' failure to list these contracts effectively removed the decision-making authority from the Division.

Capitol House also contends that the defendants misrepresented their ability to fund the proposed landside developments to Catfish Town. During the licensing process, the Division instructed the three competing license applicants to provide information concerning the nature of the developments and the related costs of their proposed

projects to Dr. Ray Perryman, so that he could evaluate the economic impact of each. Perryman's ranking, although not the sole determinative factor in deciding which applicants would receive a license, was given great weight by the Division.

Defendants, in a letter dated May 20, 1994, submitted financial information and projections of their proposed projects to Perryman and the Division. Defendants indicated that they would spend a total of $144.4 million, with Jazz spending approximately $97.2 million on the following landside developments: $44.2 million to acquire and renovate Catfish Town by July 1995; $35 million to build a convention hotel with 400+ rooms by October 1995; and $18 million to build a special event/sports center by July 1995. While Jazz committed to build these landside improvements in Phase I, Jazz could only borrow $18 million and could not obtain the financing necessary for completion of Phase I of the project without Argosy's agreement to modify a letter of intent between it and Jazz. Urie testified that Argosy refused to modify the letter of intent "a couple of months" before the licensing hearing. At that time, Jazz was running out of money and the parties unsuccessfully attempted to mediate the dispute at the end of June. At the time of the licensing hearing, Jazz could not obtain financing to complete the renovation of Catfish Town, to build the $35 million hotel, or to build the special event/sports center. Defendants did not disclose prior to or at the hearing that Argosy had refused to modify the letter of intent and that Jazz could not borrow any more funds to complete the project.

Four months after the defendants received the license, construction ceased on Catfish Town due to Jazz's inability to pay the contractor. On December 2, 1994, the stockholders of Jazz entered into an agreement to sell 100 percent of their stock to Argosy for $27,000,000. Urie testified that Argosy misrepresented to Jazz that it would help Jazz to obtain the financing necessary to build the developments promised to the Division, thereby preventing Jazz from completing the project as promised. After Argosy took over the project, it significantly scaled back the renovation of Catfish Town and other landside developments that the defendants had promised to build, including the hotel and special event/sports center. Urie testified that Argosy built just "a fraction of what was initially promised." Capitol House concludes that had the Division known that the defendants could not secure the funding necessary to build the promised facilities, the defendants would not have been awarded a license.

We note that issues concerning Jazz's ability to secure financing to build the proposed landside facilities were also raised during the course of the licensing process. Although the Division was unaware that Jazz and Argosy had disagreed over financing and the letter of intent months before the licensing hearing, the Division was aware of the allegations made against Jazz with regard to its ability to obtain financing. Cognizant of those allegations and as part of the application process, the Division reviewed the financial conditions of

each of the applicants, including both Jazz and Argosy, as well as the economic impact of each proposal. While the internal strife between the two principals eventually led Argosy to purchase Jazz's interest following the award of the license, the Division approved the sale of Jazz to Argosy, and Argosy eventually completed a scaled down Catfish Town project.

Although Jazz had difficulties obtaining the funding necessary to complete the landside developments as proposed and while Argosy ultimately scaled back the proposed landside developments, Perryman, in ranking the three proposed projects, considered what might happen "realistically" as opposed to what each applicant promised. In ranking the Jazz/Argosy project number one by a considerable margin, Perryman indicated that he assigned a 65 percent chance to the likelihood that the hotel would be built, a 25 percent chance that the parking garage would be built, and almost no chance that the special event/sports center would be built.[16] Even with the probabilities assigned by Perryman regarding the defendants' proposed facilities, Perryman testified that there was at least a 30 percent to 40 percent gap between the Jazz/Argosy project and the next closest competitor, LCC.[17] The Division relied heavily upon

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[16] Jazz was only a 10 percent partner in the venture and bore no responsibility whatsoever to fund the cost of the riverboat and its dock.

[17] Perryman also testified that Argosy did eventually complete a modified form of the Catfish Town project. Although the hotel was substantially smaller than what was proposed and was built later than the anticipated deadline, Perryman indicated

Perryman's ranking in awarding the licenses, and Perryman, in ranking the projects, took into consideration that many of the defendants' proposals would never be built or would be scaled back. Consequently, the dispute over the financing agreement between the two principals or the failure to secure funds to build the landside developments as promised did not subvert the decision-making process.

We conclude that the defendants' misrepresentations and/or omissions, when considered independently or collectively, did not subvert the Division's decision-making process to the extent that the Division could not effectively evaluate the three proposed projects and make an informed decision as to which of the applicants should receive the two licenses. Moreover, our conclusion is further supported by the fact that the Division, an independent body of disinterested decision-makers, did not take all representations at face value and it had the opportunity to review and investigate the information submitted by the applicants.

Capitol House also asserts that in addition to its state law antitrust claims asserted under the UTPL, it has also raised state tort law claims, which would not be subject to the *Noerr-Pennington* immunity doctrine. We note, however, that Capitol House's tort law claims based on allegations of intentionally false

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that the hotel Argosy actually built was approximately 65 percent of the size of the one proposed, so his firm "came pretty close on that one."

or misleading statements by the defendants to the Division are subsumed in the alleged violations of the UTPL.

To the extent that the tort claims could be considered outside of the antitrust context, we find that Capitol House has not met its burden of showing that the defendants' acts rose to the level of criminality to satisfy the standard set forth by the court in *Astoria*. In the instant case, many of the alleged fraudulent and misleading statements were specifically addressed to the Division during the course of the licensing process, and the Division considered these allegations prior to making its licensing decision, as discussed above. The Division also had the authority to pursue and seek prosecution of the defendants if it believed criminal violations occurred during the course of the licensing process, but there is no evidence of record that such action was ever undertaken.[18] By contrast, in *Astoria*, the defendants had been convicted for their criminal acts of bribery and corruption in securing their gaming licenses. As such, we do not consider any claims asserted under state tort law.

CONCLUSION

Accordingly, because the defendants' misrepresentations did not subvert the entire decision-making process, we conclude that the

[18] Moreover, Capitol House has no right to bring a criminal action against defendants, and its right and/or cause of action in tort against the defendants is also questionable.

Noerr-Pennington immunity doctrine affords Argosy immunity from liability under the UTPL. Moreover, we do not find that an independent cause of action exists under any other theory of recovery. Because we find the *Noerr-Pennington* immunity doctrine applicable in this case, we pretermit discussion of the remaining assignments of error. Therefore, the judgment is reversed. Each party is to bear its own costs associated with this appeal.

APPEAL STAYED AS TO ARGOSY OF LOUISIANA, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, AND JAZZ ENTERPRISES, INC.; MOTION TO SEVER APPEAL AS TO BANKRUPT DEFENDANTS GRANTED; MOTION FOR INDEFINITE EXTENSION OF TIME TO FILE REPLY BRIEF AS TO BANKRUPT DEFENDANTS GRANTED; MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF AS TO ARGOSY GAMING COMPANY ONLY GRANTED; JUDGMENT REVERSED.

NUMBER 2008 CA 0367
COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

VERSUS

PERRYMAN CONSULTANTS, INCORPORATED, ET AL.

BEFORE: PARRO, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J., CONCURS AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

I have concerns about reversing a judgment reflecting a verdict of the jury. I am further of the opinion that the *Noerr-Pennington* doctrine should not be interpreted broadly and should only apply in the context of Sherman antitrust litigation. However, I do note the recent case cited by the majority of *Astoria Entm't, Inc. v. Debartolo*, 08-1690 (La. 5/22/09), ___So.3d___, 2009 WL 1425837, decided by the Louisiana Supreme Court; and I am constrained to follow same.

For these reasons and, considering the unique facts of this case, I will concur with the majority.

APPENDIX C

NUMBER 418,525 DIVISION H
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

V.

PERRYMAN CONSULTANTS, INC., et al.

****

AMENDED JUDGMENT

This cause came to be heard before the court for hearing on September 10, 2007 pursuant to the Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial on the issue of Quantum, or Further in the Alternative, for Remittur (sic) of the Jury's Verdict submitted by Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc. and Catfish Queen Partnership In Commendam (the "Argosy Defendants") and the Motion For New Trial filed by Plaintiff and Defendant-in-Reconvention, Capitol House Preservation Company, L.L.C.

For oral reasons assigned:

The Court hereby GRANTS, in part, and DENIES, in part, the Argosy Defendants' Motion

and the Judgment in this matter rendered on April 24, 2007 is amended to read as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam are condemned to pay to Capitol House Preservation Company, L.L.C., *in solido,* the full sum of ONE MILLION THREE HUNDRED FIFTY-SIX THOUSAND NINE HUNDRED FIFTY-THREE AND NO/100 DOLLARS ($1,356,953.00) plus legal interest thereon from the date of judicial demand until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the Louisiana Unfair Trade Practices Act, La. R.S. 51:1401 *et seq.,* Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam are condemned to pay to Capitol House Preservation Company, L.L.C., *in solido,* its reasonable attorneys fees incurred in this matter in the amount of one-third (1/3) of the amount recovered, the parties reserving their rights in the event that the amount of the judgment is modified on appeal;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam, be taxed, *in solido,* for costs of these proceedings as follows:

a. Correro Fishman expert fee- $ 5,983.62

b. Legier & Materne expert fee - $32,200.00
c. Court costs - $15,993.79
d. Jury bond - $ 5,600.00
e. Creative Video - $ 9,713.90

for a total of $69,491.31, plus legal interest thereon from the date of this judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Reconventional Demand brought herein by Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam is hereby DISMISSED, with prejudice, at Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam's cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the that the Motion For New Trial filed by Plaintiff and Defendant-in-Reconvention, Capitol House Preservation Company, L.L.C. is DENIED as moot.

JUDGMENT READ, RENDERED AND SIGNED on the 27 day of September, 2007 in Baton Rouge, Louisiana.

/s/
HON. WILLIAM A. MORVANT, JUDGE
19th JUDICIAL DISTRICT COURT

Judgment prepared by:

/s/

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APPENDIX D

NUMBER 418,525 DIVISION H
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

V.

PERRYMAN CONSULTANTS, INC., et al.
****

JUDGMENT

This cause came to be heard on the merits before a jury on January 22, 23, 24, 25, 26, 29, 30, 31 and February 1, 2, and 6, 2007.

PRESENT:

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P.O. Box 2471
Baton Rouge, LA 70821

After hearing the evidence and the argument of counsel, and having been instructed on the applicable law, the jury found in favor of the plaintiff, Capitol House Preservation Company, L.L.C., against the defendants, Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam, on the claims brought by the plaintiff in this matter and awarded plaintiff THREE

MILLION EIGHT HUNDRED TWENTY-THREE THOUSAND SEVEN HUNDRED EIGHTY-SIX AND NO/100 DOLLARS ($3,823,786.00) in damages.

Pursuant to the verdict of the jury herein, and considering same to be supported by the law and evidence,

IT IS ORDERED, ADJUDGED AND DECREED that the jury verdict be and is hereby made the judgment of this Court, and accordingly, Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam are condemned to pay to Capitol House Preservation Company, L.L.C., *in solido*, the full sum of THREE MILLION EIGHT HUNDRED TWENTY-THREE THOUSAND SEVEN HUNDRED EIGHTY-SIX AND NO/100 DOLLARS ($3,823,786.00) plus legal interest thereon from the date of this judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the Louisiana Unfair Trade Practices Act, La. R.S. 51:1401 *et seq.*, Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam are condemned to pay to Capitol House Preservation Company, L.L.C., *in solido*, its reasonable attorneys fees incurred in this matter in the amount of one-third (1/3) of the amount recovered, the parties reserving their rights in the event that the amount of the judgment is modified on appeal;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam, be taxed, *in solido*, for costs of these proceedings as follows:

a. Correro Fishman expert fee -	$ 5,983.62
b. Legier & Materne expert fee -	$32,200.00
c. Court costs -	$15,993.79
d. Jury bond -	$ 5,600.00
e. Creative Video -	$ 9,713.90

for a total of $69,491.31, plus legal interest thereon from the date of this judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Reconventional Demand brought herein by Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam is hereby DISMISSED, with prejudice, at Argosy Gaming Company, Argosy of Louisiana, Inc., Jazz Enterprises, Inc., and Catfish Queen Partnership In Commendam's cost.

JUDGMENT READ, RENDERED AND SIGNED on the 24 day of April, 2007 in Baton Rouge, Louisiana.

/s/
HON. WILLIAM A. MORVANT, JUDGE
19TH JUDICIAL DISTRICT COURT

Judgment prepared by:

/s/
CHARLES S. LAMBERT, JR.

CHARLES S. LAMBERT, JR.
Bar Roll No. 21685
11940 Industriplex, Suite 1
Baton Rouge, LA 70809
Telephone: (225) 405-0660
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321 St. Joseph Street
Baton Rouge, LA 70802
Telephone: (225) 344-0800
Fax: (225) 346-1430

DANIEL D. HOLLIDAY, III
Bar Roll No. 23135
Daniel D. Holliday, III, attorney at law, LLC
321 St. Joseph Street
Baton Rouge, LA 70802
Telephone: (225) 378-9991
Facsimile: (225) 346-1430
ATTORNEYS FOR CAPITOL HOUSE
PRESERVATION COMPANY, L.L.C.

APPENDIX E

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2008-CA-0367

Capitol House Preservation Company, L.L.C.
- Versus --
Perryman Consultants, Inc., M. Ray Perryman, XYZ Insurance Company and TUV Insurance Company

19th Judicial District Court
Case #: 418,525
East Baton Rouge Parish

On Application for Rehearing filed 09/11/2009
Rehearing Denied

/s/
RANDOLPH H. PARRO
/s/
JOHN T. PETTIGREW
/s/
JEWEL E. "DUKE" WELCH

Filed: NOV 06 2009

/s/
Christine L. Crow, Clerk

APPENDIX F

NUMBER 418,525 DIVISION H
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

V.

PERRYMAN CONSULTANTS, INC., et al.
****

VERDICT FORM

1. Do you find that the following defendants knowingly and intentionally made materially false, untrue, and/or misleading representations in their application for a license to conduct gaming activities in violation of the Louisiana Riverboat Economic Development and Gaming Control Act?

A. Jazz Enterprises, Inc.	Yes X	No __	10/2
B. Catfish Queen Partnership	Yes X	No __	10/2
C. Argosy Gaming Company	Yes X	No __	10/2

If your answer to question No.1 is "No" as to all three defendants, please sign the verdict form and return to the courtroom. If your answer is "Yes" as to any defendant, please proceed to question No.2.

2. Do you find that the following defendants knowingly failed to disclose a violation of the Riverboat Act in contravention of their continuing duty to disclose such a violation?

A. Jazz Enterprises, Inc.	Yes X	No __	10/2
B. Catfish Queen Partnership	Yes X	No __	10/2
C. Argosy Gaming Company	Yes X	No __	10/2

If your answer to question No.2 is "No" as to all three defendants, please sign the verdict form and return to the courtroom. If your answer is "Yes" as to any defendant, please proceed to question No.3.

3. Do you find that the following defendants' violation of the Riverboat Act constitutes a violation under the Louisiana Unfair Trade Practices Act?

A. Jazz Enterprises, Inc.	Yes X	No __	10/2
B. Catfish Queen Partnership	Yes X	No __	10/2
C. Argosy Gaming Company	Yes X	No __	10/2

If your answer to question No.3 is "No" as to all three defendants, please sign the verdict form and return to the courtroom. If your answer is "Yes" as to any defendant, please proceed to question No.4.

4. Do you find that the license application of Jazz and Catfish Queen would have been denied based on the submission of materially false, untrue, and/or misleading representations in their application?

Yes X No __ 10/2

If your answer to question No.4 is "No," please sign the verdict form and return to the courtroom. If your answer is "Yes," please proceed to question No.5.

5. Do you find that plaintiff would have been awarded the riverboat gaming license had the defendants not been issued the license?

Yes X No __ 12/0

If your answer to question No.5 is "No," please sign the verdict form and return to the courtroom. If your answer is "Yes," please proceed to question No.6.

6. Do you find that plaintiff suffered an ascertainable loss such that it is entitled to recover damages as a result of defendants' actions?

Yes X No __ 10/2

If your answer to question No.6 is "No," please sign the verdict form and return to the courtroom. If your answer is "Yes," please proceed to question No.7.

7. What amount of damages will fairly and adequately compensate plaintiff?

$3,823,786.00

Foreperson: /s/
Michael P. Sotile, Jr.

Date: 2/6/2007

APPENDIX G

The relevant provisions of the Louisiana Riverboat Economic Development and Gaming Control Act, La. R.S. 27:41 *et seq.* referenced in the petition are set forth below:

La. R.S. 27:2(A) provides:

> The legislature hereby finds and declares it to be the public policy of the state that the development of a controlled gaming industry to promote economic development of the state requires thorough and careful exercise of legislative power to protect the general welfare of the state's people by keeping the state free from criminal and corrupt elements. The legislature further finds and declares it to be the public policy of the state that to this end all persons, locations, practices, associations, and activities related to the operation of licensed and qualified gaming establishments and the manufacture, supply, or distribution of gaming devices and equipment shall be strictly regulated.

La. R.S. 27:28 provides:

> A. No person shall be eligible to obtain a license or permit, enter into a casino operating contract with the state, or obtain any other approval pursuant to the provisions of this Title unless the applicant has demonstrated by clear and convincing evidence to the board or division, where applicable, that he is suitable. For the purposes of this Title,

"suitable" means the applicant, licensee, casino gaming operator, permittee, or other person is:

(1) A person of good character, honesty, and integrity.

(2) A person whose prior activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or carrying on of the business and financial arrangements incidental thereto.

(3) Capable of and likely to conduct the activities for which the applicant, licensee, permittee, casino gaming operator, or licensed eligible facility is licensed, permitted, or approved pursuant to the provisions of this Title.

(4) Not disqualified pursuant to the provisions of Subsection B of this Section.

B. The board or division, where applicable, shall not grant a license or permit, enter into a casino operating contract, or issue any other approval pursuant to the provisions of this Title to any person who is disqualified on the basis of the following criteria:

(1) The conviction or a plea of guilty or nolo contendere by the applicant or any person required to be suitable under the

provisions of this Title for any of the following:

(a) Any offense punishable by imprisonment of more than one year.

(b) Theft or attempted theft, illegal possession of stolen things, or any offense or attempt involving the misappropriation of property or funds.

(c) Any offense involving fraud or attempted fraud, false statements or declarations.

(d) Gambling as defined by the laws or ordinances of any municipality, any parish or county, any state, or of the United States.

(e) A crime of violence as defined in R.S. 14:2(B).

(2) There is a current prosecution or pending charge against the person in any jurisdiction for any offense listed in Paragraph (1) of this Subsection.

(3) The person is not current in filing all applicable tax returns and in the payment of all taxes, penalties, and interest owed to the state of Louisiana or any political subdivision of Louisiana, excluding items under formal appeal.

(4) The failure to provide information and documentation to reveal any fact material to a suitability determination,

or the supplying of information which is untrue or misleading as to a material fact pertaining to the suitability criteria.

C. (1) In the awarding of a license, permit, casino operating contract, or other approval pursuant to the provisions of this Title, a conviction or plea of guilty or nolo contendere by the applicant shall not constitute an automatic disqualification as otherwise required pursuant to the provisions of Subparagraphs (a), (b). (c), and (d) of Paragraph (1) of Subsection B of this Section if:

(a) Ten or more years has elapsed between the date of application and the successful completion or service of any sentence, deferred adjudication, or period of probation or parole; or

(b) Five or more years has elapsed between the date of application and the successful completion of any sentence, deferred adjudication, or period of probation or parole and the conviction for an offense defined in R.S. 27:28(B)(1)(b) was a misdemeanor offense.

(2) The provisions of Paragraph (1) of this Subsection shall not apply to any person convicted of a crime of violence as defined in R.S. 14:2(B).

(3) Notwithstanding any provision of law to the contrary, the board and division may consider the seriousness and circumstances of any offense, any arrest, or any conviction in determining suitability in accordance with Subsection A of this Section.

D. An applicant who is not disqualified as a result of Subsection B of this Section shall be required to demonstrate to the board and division that he otherwise meets the remaining requirements for suitability, particularly those contained in Paragraphs (A)(1), (2), and (3) of this Section. Evidence of, or relating to, an arrest, summons, charge, or indictment of an applicant, or the dismissal thereof, may be considered by the board or division even if the arrest, summons, charge, or indictment results in acquittal, deferred adjudication, probation, parole, or pardon.

E. Any person whose license or permit has been revoked or who has been found unsuitable in this state or any other jurisdiction is not eligible to obtain any license or permit pursuant to the provisions of this Title for a period of five years from the date the revocation or finding of unsuitability becomes final.

F. All licensees, all permittees, the casino gaming operator, and any other persons who have been found suitable or approved by the board or division shall maintain suitability throughout the term of the license, permit, casino operating contract, or approval. In the

event of a current prosecution of an offense as provided in R.S. 27:28(B)(2), the board, or division where applicable, shall have the discretion to defer a determination on a person's continuing suitability pending the outcome of the proceedings provided that if a decision is deferred pending such outcome the board, or division where applicable, may take such action as is necessary to protect the public trust, including the suspension of any license or permit.

G. All licensees, all permittees, the casino gaming operator, and any other persons required to be found suitable shall have a continuing duty to inform the board and division of any possible violation of this Title and of any rules adopted by the board. No person who so informs the board or division of a violation or possible violation shall be discriminated against by the applicant, licensee, permittee, or casino gaming operator because of supplying such information.

H. (1) Any person who has or controls directly or indirectly five percent or more ownership, income, or profit or economic interest in an entity which has or applies for a license or permit or enters into a casino operating contract with the state pursuant to the provisions of this Title, or who receives five percent or more revenue interest in the form of a commission, finder's fee, loan repayment, or any other business expense related to the gaming

operation, or who has the ability, in the opinion of the board, to exercise a significant influence over a licensee, the casino gaming operator, a permittee, or other person required to be found suitable pursuant to the provisions of this Title, shall meet all suitability requirements and qualifications pursuant to the provisions of this Title.

(2) (a) A lessor of immovable property forming any part of the complex of a licensed gaming operation is required to submit to suitability.

(b) Notwithstanding anything contained in this Chapter to the contrary, the obligations to the division of the real estate lessor of a licensee who receives less than two percent of the net gaming revenue of a licensee and who is not involved in the day-to-day operations of the licensee shall be to provide such financial information, documentation, and necessary release forms for the division to make a determination that no person who fails to meet suitability requirements is receiving any funds received by the lessor from the licensee, or is participating in the management of the affairs or business operations of the lessor. An

individual who is an officer, director or has five percent or more economic interest in a lessor who receives less than two percent of the net gaming revenue of a licensee shall provide only the information required of a person permitted as in R.S. 27:29.4(B).

I. If the board finds that an individual owner or holder of a security of a licensee, permittee, or the casino gaming operator, or of a holding or intermediary company of a licensee, permittee, or the casino gaming operator, or any person or persons with an economic interest in a licensee, permittee, or the casino gaming operator, or a director, partner, officer, or managerial employee is not suitable, and if as a result, the licensee, permittee, or casino gaming operator is no longer qualified to continue as a licensee, permittee, or casino gaming operator, the board shall propose action necessary to protect the public interest, including the suspension or revocation of the license or permit, or any action authorized under the casino operating contract. The board may also issue under penalty of revocation or suspension of a license or permit, or any action authorized under the casino operating contract, a condition of disqualification naming the person or persons and declaring that such person or persons may not:

(1) Receive dividends or interest on securities of a person, or a holding or intermediary company of a person, holding a license, casino operating contract, permit, or other approval.
(2) Exercise directly, or through a trustee or nominee, a right conferred by securities of a person, or a holding or intermediary company of a person, holding a license, casino operating contract, permit, or other approval of the board issued pursuant to the provisions of this Title.
(3) Receive remuneration or other economic benefit from any person, or a holding or intermediary company of a person, holding a license, casino operating contract, permit, or other approval issued pursuant to this Title.
(4) Exercise significant influence over activities of a person, or a holding or intermediary company of a person, holding a license, casino operating contract, permit, or other approval issued pursuant to the provisions of this Title.
(5) Continue owning or holding a security of a person, or a holding or intermediary company of a person, holding a license, casino operating contract, permit, or other approval of the board issued pursuant to the provisions of this Title or remain as a

manager, officer, director, or partner of a licensee or permittee.

J. In the awarding of a license, permit, casino operating contract, or other approval pursuant to the provisions of this Title, the board and division may consider that the person is not current in filing all applicable tax returns and in the payment of all taxes, penalties, and interest owed the Internal Revenue Service, excluding items under formal appeal. However, if the board or the division awards a license, permit, contract, or other approval to a person who is not current in payments owed to the Internal Revenue Service, the person shall subsequently be found unsuitable if he is not current in payments owed the Internal Revenue Service within sixty days of the issuance of such license, permit, contract, or other approval.

K. Except for video draw poker manufacturers, the provisions of this Section shall not apply to persons licensed pursuant to the provisions of the Video Draw Poker Devices Control Law as provided in Chapter 6 of this Title.

Acts 2001, No. 1222, §1, eff. July 2, 2001; Acts 2004, No. 753, §1.

La. R.S. 27:30 provides:

> A. No person shall knowingly or intentionally make a material false statement in any application for a license to conduct gaming activities, casino operating contract, permit, or suitability determination pursuant to the provisions of this Title. No person shall intentionally make a material false statement in any book, record, form, or any other document which is required, compiled, or maintained pursuant to the provisions of this Title.

B. Any person who violates any of the provisions of this Section shall be imprisoned at hard labor for not more than ten years and may be fined an amount not to exceed ten thousand dollars, or both.

La. R.S. 27:58(9) provided:

> The division shall . . .
>
> (9) Ensure that licenses or permits are not issued to or held by a disqualified person, and that there is no material involvement, directly or indirectly, with a licensee by a disqualified person in accordance with R.S. 27:76.

La. R.S. 27:58(9) was amended July 2, 2001, when La. R.S. 27:76 was redesignated as La. R.S. 27:28(B)(4). See above.

La. R.S. 27:65(A) provided:

> Notwithstanding any other provisions of law to the contrary, upon application properly submitted and examined, the division may issue up to fifteen licenses to conduct gaming activities on a riverboat, which is of new construction in accordance with the provisions of this Chapter.

La. R.S. 27:70(A) provided:

> No person shall be eligible to receive a license to conduct gaming operations on a riverboat or any license or permit issued pursuant to the provisions of this Chapter unless the division finds that:
>
> (1) The applicant is a person of good character, honesty, and integrity.
>
> (2) The applicant is a person whose prior activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto.

La. R.S. 27:70(A) was amended by Acts 2001, No. 1222, §2, eff. July 2, 2001, and was redesignated as La. R.S. 27:28(A).

La. R.S. 27:70(C) provided:

> All persons licensed or permitted or required to be licensed or permitted under this Chapter shall have a duty to inform the division of any action which they believe would constitute a violation of this Chapter.

La. R.S. 27:70(C) was amended July 2, 2001, and was redesignated as La. R.S. 27:28(G).

La. R.S. 27:73 provided:

> A. At the conclusion of the division's investigation the division shall hold a public hearing to determine if the provisions of this Chapter have been met, and if the issuance of a gaming license to the applicant is in the best interests of the state and consistent with the intent of the legislature as expressed in this Chapter.
>
> B. Within ten days following the conclusion of the public hearing the division shall grant or deny the license. No person shall be granted or denied a license without a hearing, unless the maximum number of licenses authorized under this Chapter have been issued.
>
> C. The division may, if it deems it in the best interest of the state and enters into the record the reasons, issue a license or permit to a qualified applicant subject to one or more conditions agreed to by the applicant.

La. R.S. 27:76(A)(2) provided:

> The division or the Louisiana Gaming Control Board shall not award a license or permit to any person who is disqualified on the basis of any of the following criteria: . . . Failure of the applicant to provide information and documentation to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria.

La. R.S. 27:76(A)(2) was amended by Acts 2001, No. 1222, §2, eff. July 2, 2001, and redesignated as La. R.S. 27:28(B)(4).

La. R.S. 27:99(A) provides:
"knowingly or intentionally make a material false statement in any application for a license to conduct gaming activities."
La. R.S. 4:558 was redesignated as La. R.S. 27:99 by 1996 La Acts, No. 7, § 3, 1st Ex. Sess. and later repealed by 2001 La Acts No. 1222, § 2, effective July 2, 2001. The latter act also enacted La. R.S. 27:30, a provision substantially similar to La. R.S. 27:99. See La. R.S. 27:30 above.

APPENDIX H

IN RE: APPLICATION OF
LADY LUCK BATON ROUGE CASINO, INC.,
LOUISIANA CASINO CRUISES, INC.,
AND CATFISH QUEEN PARTNERSHIP IN
COMMENDAM/JAZZ ENTERPRISES, INC.
FOR A LICENSE TO CONDUCT
GAMING ACTIVITIES ON A RIVERBOAT
IN BATON ROUGE

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Lady Luck Baton Rouge Casino be denied a license to conduct gaming activities on a riverboat. This application is denied on the grounds that all fifteen licenses have been issued. This denial is without prejudice.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/
LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

APPENDIX I

LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS
OFFICE O STATE POLICE
RIVERBOAT GAMING DIVISION
P.O. BOX 66614
BATON ROUGE, LA 70896-6614

LEVEL I
RIVERBOAT LICENSE
APPLICATION
PART A

. . .

Official Name of Company
Jazz Enterprises, Inc.

. . .

1. Name and addresses of all Principal Officers, Directors, Partners and Stockholders of 5% or more.

Name (Last)	(First)	(M.I.)	Soc. Sec #
Johnson	Ronald	A.	XXX-XX-8060
D.O.B.	Position		%Ownership
04-16-40	President		50%

. . .

Name (Last)	(First)	(M.I.)	Soc. Sec #
Bradley	Mark	R.	XXX-XX-0133
D.O.B.	Position		%Ownership
04-16-40	President		50%

. . .

Name (Last)	(First)	(M.I.)	Soc. Sec #
Urie	Steven	H.	XXX-XX-0576
D.O.B.	Position		%Ownership
05-18-44	Director		

. . .

20. List all persons or companies with whom the corporation has contracts or agreements $50,000 or more in value pertaining to the gaming industry. (attach list as Exhibit #20).

. . .

SCHEDULE I
CONTINGENT LIABILITIES

List below the information for all contingent liabilities for which the applicant is obligated:

"N/A"

AFFIDAVIT OF FULL DISCLOSURE

State of Nevada
Count/Parish of Washoe

I, Ronald A. Johnson, being first duly sworn upon oath or affirmation, depose and state:

That, except as reported in Applicant's/my Application ("Application"), I have no agreements or understandings with any person or entity and no present intent to hold as agent, nominee or otherwise any interest in the Application;

That, except as reported in the Application. I have no agreements or understandings with any person or entity and no present intent to pay any sums of money or give anything of value, including but without limitation, a finder's fee or commission to any person or entity related to the acquisition of any interest in the Application.

That, except as reported in the Application, I have no agreements or understandings and no present intent to pay any sums of money or give anything of value as, including but without limitation, a finder's fee or commission to any person or entity related to the sale of any interest in the Application.

"Ronald A. Johnson"
(Individual's signature)
Address: 1010 LaRue
Reno, NV

SUBSCRIBED and SWORN to before me this
27th day of July, 1993

/s/
Notary Public
My commission expires on ____, 19__.

JENNIFER CLARK
Notary Public-State of Nevada
Appointment Recorded in Washoe Count
MY APPOINTMENT EXPIRES DEC. 28, 1993

Seal

VERIFICATION

State of Nevada
Count/Parish of Washoe

I, Ronald A. Johnson, being first duly sworn upon oath or affirmation, depose and state:

1. I am the individual who is submitting this Form.
2. I personally supplied the information contained in this Form.
3. I swear (or affirm) that the information contained in this Form is true, complete and accurate to the best of my knowledge and belief.

"Ronald A. Johnson"
(Individual's signature)

SUBSCRIBED and SWORN to before me this
27th day of July, 1993

/s/
Notary Public
My commission expires on _____, 19__.

JENNIFER CLARK
Notary Public-State of Nevada
Appointment Recorded in Washoe Count
MY APPOINTMENT EXPIRES DEC. 28, 1993

APPENDIX J

Election by a Small Business Corporation

Form 2553
(Rev. December 1990)

Part I Election Information
Name of corporation (see instructions)
Jazz Enterprises, Inc.

. . .

J. Name and address of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety. (A husband and wife (and their estate) are computed as one shareholder in determining the number of shareholders without regard to the manner in which the stock is owned.)

Steve Urie
Peggy Urie
Ronald Johnson
Marilyn Johnson

K. Shareholders' Consent Statement. We, the undersigned shareholders, consent to the corporation's election to be treated as an "S corporation" under section 1362(a). (Shareholders sign and date below.)*

_____ */s/*
Steve Urie

/s/
Peggy Urie
/s/
Ronald Johnson
/s/
Marilyn Johnson

*= for this election to be valid, the consent of each shareholder, person having a community property interest in the corporation's stock, each tenant in common, joint tenant, and tenant by the entirety must appear above or be attached to this form. (See instructions to Column K if continuation sheet or a separate consent statement is needed.)

L. Stock owned

	Number of shares	Dates acquired
Steve Urie	100 shares	2/93
Peggy Urie	*	2/93
Ronald Johnson	100 shares	2/93
Marilyn Johnson	*	

. . .

Under penalties of perjury, I declare that I have examined this section, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of Officer: Ronald A. Johnson
Title: Pres. Date: 5/12/1993

APPENDIX K

NUMBER: 418,525 SEC: "23"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

VERSUS

PERRYMAN CONSULTANTS, INC., MR. M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, INC. AND ARGOSY GAMING COMPANY

AFFIDAVIT

STATE OF NEVADA
COUNTY OF CLARK

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the county and State aforesaid, personally came and appeared:

RONALD A. JOHNSON

1. Steve Urie ("Urie") provided all of the equity that capitalized Jazz Enterprises, Inc. ("Jazz"). Urie agreed to and did provide the funding for the start up and development costs of Jazz. Urie exercised total control over Jazz prior to and during the gaming approval and application process. Prior to the submission of Jazz's application for a certificate of preliminary approval, Urie, Ronald Johnson ("Johnson"), and Mark Bradley ("Bradley") agreed that Urie had the power and control to obtain an ownership interest in excess of 5% from the nominee owners of Jazz--Johnson and Bradley--at a nominal cost in the percentage of ownership determined by Urie at the time of Urie's choosing. Urie dictated how the ownership of Jazz was reported to the gaming regulators, including in the application for a certificate of preliminary approval and the application for a riverboat license submitted by Jazz.
2. Around the time that Jazz and Baton Rouge Gaming executed the term sheet agreement dated April 30, 1993, Jazz consulted Grant Thornton on whether Jazz should elect to be treated by the IRS as an S or C corporation with Johnson's knowledge. Urie instructed Bob Rule to prepare a form for Sub S election reflecting that the shareholders of Jazz were Urie and Johnson and each owned 50% of the shares issued by Jazz at the date it was signed on May 12, 1993. Jazz, through Urie and Johnson, submitted the Form 2553 dated May 12, 1993 (identified G 013190) to the IRS electing Jazz to be treated as an S corporation. Urie dictated how Jazz and Johnson reported the information concerning the

shareholders of Jazz contained in the Form 553 dated May 12, 1993 submitted to the IRS.

/s/
RONALD A. JOHNSON

SWORN TO AND SUBSCRIBED before me, Notary Public, on this _ day of July,

/s/
NOTARY PUBLIC

KENNETH ESTACIO
Print Name
Notary ID/Bar Rooll No. 04-91129-1

Kenneth Estacio
NOTARY PUBLIC
STATE OF NEVADA
Date Appointment Exp: June 24, 2008
Certificate No. 04-91129-1

APPENDIX L

NUMBER: 418,525 SEC: "23"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.

VERSUS

PERRYMAN CONSULTANTS, INC., MR. M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, INC. AND ARGOSY GAMING COMPANY

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the Parish and State aforesaid, personally came and appeared:

who, after first being duly sworn, did declare and say:

1. Steve Urie ("Urie") provided all of the equity that capitalized Jazz Enterprises, Inc. ("Jazz"). Urie agreed to and did provide the funding for the start up and development costs of Jazz. Urie exercised total control over Jazz prior to and during the gaming approval and application process. Prior to the submission of Jazz's application for a certificate of preliminary approval, Urie, Ronald Johnson ("Johnson") and the undersigned agreed that Urie had the power and control to obtain an ownership interest in excess of 5% from the nominee owners of Jazz (Johnson and the undersigned) at a nominal cost in the percentage of ownership determined by Urie at the time of Urie's choosing. Urie told Johnson and the undersigned how the ownership of Jazz was to be reported to the gaming regulators, including in the application for a certificate of preliminary approval and the application for a riverboat license submitted by Jazz. Jazz, Johnson and the undersigned followed Urie's directions on how to report the ownership of Jazz to the gaming regulators.

2. Jazz, Urie, Johnson, and the undersigned executed a settlement agreement ("Hayden Settlement Agreement") on or around March 20, 1993 with Randy Hayden, Larry Henry and Creative Communications ("Hayden, *et al.*"). Under the terms of the Hayden Settlement Agreement, Jazz was obligated to pay $350,000 to Hayden, *et al.* contingent upon the condition that a gaming license

was issued to Jazz. The undersigned and, to the best of his knowledge, Jazz and its other principals -- Urie and Johnson -- did not disclose the existence of the Hayden Settlement Agreement or the obligations set forth therein to the gaming regulators.

3. By letter dated August 9, 1993, Attorney General Ieyoub requested the Louisiana Riverboat Gaming Commission ("Commission") determine whether pertinent statutes under the Louisiana Riverboat Economic Development and Gaming Control Act ("Riverboat Act") and Commission rules required the revocation of the certificate of preliminary approval awarded to Jazz. On August 13, 1993, the Commission instructed its staff to conduct such an investigation. Jack Yelverton, Jenifer Schaye, and Barton Conradi from the office of the Attorney General conducted the investigation authorized by the Commission after the undersigned received notice that the Jazz application was suspended. Through this investigation, including the deposition of the undersigned taken October 18, 1993, the office of the Attorney General put Jazz and its principals on notice that it was a violation of the Riverboat Act and related rules and regulations to submit untrue, misleading, and/or false information to the gaming regulators.

/s/
MARK R. BRADLEY

SWORN TO AND SUBSCRIBED before me, Notary Public, on this 15th day of September, 2006.

/s/

NOTARY PUBLIC

JEANNE COMEAUX

Print Name

Notary ID/Bar Roll No. 22999

APPENDIX M

MUTUAL RELEASE, SETTLEMENT AND CONFIDENTIALITY AGREEMENT

THIS MUTUAL RELEASE, SETTLEMENT AND CONFIDENTIALITY AGREEMENT ("Agreement") is made and entered into this 27th day of August, 1993, by and between Baton Rouge Gaming, Inc. ("Subsidiary") and Jazz Enterprises, Inc. ("Jazz").

RECITALS

Whereas, on or about April 30, 1993, Jazz and Subsidiary executed a Term Sheet. for a limited partnership and related transactions ("Term Sheet"); Whereas, on or about April 30, 1993, Subsidiary paid to Jazz the amount of Four Hundred Thousand Dollars ($400,000) pursuant to the terms of the Term Sheet;

Whereas, Subsidiary and Jazz have expended additional sums pursuant to the terms of the Term Sheet;

Whereas, Subsidiary and Jazz mutually desire to terminate all obligations, liabilities and responsibilities arising out of, created by, or in any way relating to the Term Sheet;

Whereas, the parties desire to settle all their differences without admission of any fault by either party; and

Whereas, Subsidiary and Jazz now desire to execute the herein Mutual Release, Settlement, and Confidentiality Agreement and fully settle all

matters which in any way relate to the Term Sheet and/or the relationship between the parties established pursuant to the Term Sheet;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties mutually covenant and agree as follows:

1. Upon execution of this Agreement, Jazz shall pay Subsidiary the sum of Four Hundred Thousand Dollars ($400,000). In addition to the Four Hundred Thousand Dollars ($400,000) Jazz shall pay Subsidiary the additional sum of Two Hundred and Fifty Thousand Dollars ($250,000). The additional Two Hundred and Fifty Thousand Dollars ($250,000) shall be paid within thirty (30) days of the date that the Louisiana Riverboat Gaming Commission grants to Jazz a final gaming license.

2. The parties agree that the herein Mutual Release, Settlement and Confidentiality Agreement is being entered into without an admission of liability or fault by Subsidiary or Jazz and that the payment of monies and release of obligations is an accommodation between the parties to avoid differences and disputes.

3. In consideration of 'the terms set forth herein, Subsidiary hereby fully releases and forever discharges Jazz, any and all related corporate entities, and all parties associated in any way with Jazz or this Term Sheet including, but not limited to, City of Baton Rouge, Louisiana Riverboat Gaming Commission, Argosy, attorneys and firms associated with Jazz and the Term Sheet and all employees and

agents of any such parties or entities, of and from any and all actions, liabilities, claims and causes of action, known or unknown, arising out of, or in any way relating to the Term Sheet and 'the relationship between the parties.

4. In consideration of the terms set forth herein, Jazz hereby fully releases and forever discharges Subsidiary, any and . . .

APPENDIX N

SETTLEMENT AGREEMENT AND GENERAL RELEASE

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE
STATE OF NEVADA
COUNTY OF WASHOE

BEFORE US the undersigned Notaries and in the presence of the undersigned witnesses personally came and appeared:

RANDY HAYDEN

. . .

LARRY HENRY

. . .

CREATIVE COMMUNICATIONS, INC.

. . .

(the above three Appearers collectively referred to as "Claimants") and further appeared:

PAULA AND MARK BRADLEY

. . .

STEVE URIE

. . .

RON JOHNSON

. . .

LODGING SYSTEMS

. . .

TSF, INC.

. .

(the six above Appearers collectively referred to as "Participants") and further appeared:

. . .

All of whom stated an agreed as follows:

RECITALS

WHEREAS the Claimants and the Participants signed a Letter of Intent dated February 7, 1992, a copy of which is attached hereto as Exhibit A;

WHEREAS Jazz was incorporated as a Louisiana corporation and has applied for a riverboat gaming license for the Parish of East Baton Rouge;

WHEREAS a dispute has arisen between the Claimants and the Participants including Jazz as to the ownership of Jazz, the manner in which the Letter of Intent would be implemented, and the gaming application process;

WHEREAS the Claimants, the Participants, and Jazz have agreed to settle their disputes through compromise after weighing the risk of loss against the chance of gain;

WHEREAS a settlement letter was executed by the Claimants' attorney, James R. Lackie, on March 10, 1993, a copy of which is attached hereto as Exhibit B; and

WHEREAS as agreed in the above referenced settlement letter, the settlement was to be formalized in a formal settlement agreement;

IT IS NOW THEREFORE agreed to as follows:

SETTLEMENT AGREEMENT

This Agreement is effective as of March 10, 1993 and the terms and conditions are set forth as follows:

1. On or before April 5. 1993, a FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS payment by Jazz or designee will be made by cashier's check payable jointly to Randy Hayden, Larry Henry and Creative Communications. This payment shall not be contingent upon the granting of a riverboat gaming license to Jazz.

2. Funds currently held by Hayden in escrow in the approximate amount of TWELVE THOUSAND AND NO/100 ($12.000.00) DOLLARS is hereby released to Claimants and is not part of the consideration paid hereunder to resolve the various disputes.

3. If and only if a riverboat gaming license is granted to Jazz, then in that even Jazz will pay Claimants an additional THREE HUNDRED FIFTY THOUSAND AND NO/100 ($350,000.00) DOLLARS as follows:

a. Within thirty (30) days of a granting of a riverboat gaming license for East Baton Rouge Parish To Jazz, A payment of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS by cashiers check will be made jointly to Claimants;

b. Within sixty (60) days of a granting of a riverboat gaming license for East Baton Rouge Parish To Jazz, its partners, or their assigns begins business with the

public, another payment of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS by cashiers check will be paid jointly to Claimants;

c. Every ninety (90) days after the payment referenced to in Paragraph (b) above, a payment of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS by cashiers check will be paid jointly to Claimants until the balance due is paid in full.

There will be a total of fourteen (14) payments of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS each.

4. If a payment is not made within fifteen (15) days of when due, the failure to pay will be deemed an event of default. Further, any failure to perform as proposed under this Agreement shall be deemed a default. Failure to exercise any available options shall not constitute a waiver of the right to exercise same in the event of continued or subsequent defaults. If Claimants are forced to file suit for a collection, the Claimants shall be entitled to collect reasonable attorney's fees and all costs.

Defaulted installments shall accrue interest at the rate of ten (10%) percent per annum form date of default until paid in full.

APPENDIX O

JAZZ ENTERPRISES, INC.

May 3, 1994

Mr. John J. Thar
Executive Director
Indiana Gaming Commission
Indiana Government Center South
302 W. Washington street, Room E203
Indianapolis, Indiana 46204-2767

Dear Mr. Thar:

As requested, please find my Personal Disclosure Form 1. The form is submitted as part of your background investigation of Dunes Marina Resort & Casino, Inc. In addition to the form, you asked for the following explanations in your letter of April 26, 1994.

1. *The reasons and business transaction(s) resulting in the approximate $2.2 million dollars flowing from you to Peter Wilday along with all accompanying documentation, noting whether the documentation was created before or after the April. 21, 1994 interview and the exact date of the creation of the documentation.*

Peter Wilday is a friend and a valued business associate. He is the lead architect and designer for Jazz Enterprises, Inc., the developers of a $60 million riverboat project at catfish Town in Baton

Rouge, Louisiana. He is a key member of the Jazz Management team, representing Jazz in its relations with public and private agencies. And he has been the primary negotiator/developer in attracting national food and beverage and entertainment companies to Catfish Town. He is one of the three members of the development team for Jazz Enterprises - Ron Johnson, Jazz's president, and I are the other two. Upon licensing for a riverboat project at Catfish Town, which will then assure a successful project, Mr. Wilday will be extended an invitation to be a Director of Jazz Enterprises. A second major project Mr. Wilday is working on with me is the conversion of the Reno Railroad Station and Freight Building into a casino/entertainment complex. For these two projects and other assistance, Mr. Wilday has been reimbursed for only his out-of-pocket expense. As with all commercial development there will be no financial return until successful completion and operational startup. The imputed value of Mr. Wilday's design, council and assistance to my projects is in excess of $3 million dollars. The line of $2.2 million dollars is an advance towards his unbilled current and future work. (For developments of this size and risk compensation for "sweat equity" of this magnitude for industry professionals of Mr. Wilday's stature is not uncommon. Jazz Enterprises has similarly granted an interest of not less than five percent - $2 million dollars of value - to Mark Bradley, its Vice President of Operations. Mr. Bradley has two years of industry experience.) There are no written agreements with Mr. Wilday, other than that acknowledged and reflected in this letter.

2. *What right, claims, interest, etc. you or any other person or entity will have to the 17% interest of Mr. Wilday based upon the flow of money –*

Neither Jazz Enterprises, nor anyone else to my knowledge have any right, claims or interest in Mr. Wilday's 17% interest in Dunes.

3. *The exact source of the money, including any and all documentation establishing the source, along with an explanation as to whether the documentation was created before or after the April 21, 1994 interview and the exact date of the creation of the documentation -*

Argosy Gaming has loaned $15 million dollars interest free and payment free for five years to me. They have also loaned $2.5 million at bank rates to me. Of the $17.5 million dollars only $12.5 million must be used towards the development of Catfish Town, leaving $5 million for discretionary use. The dated documents are enclosed.

4. *The exact relationship among you, Jazz and Argosy, and if not previously explained, to what extent Jazz or Argosy money is represented in the $2.2 million dollars flowing to Mr. Wilday and what claim, right, interest, etc., any of the 3 will have to the 17% interest –*

This question is responded to in 2. and 3. above and documented by the enclosed Jazz/Urie/Argosy agreements. None of Jazz/Argosy/Urie has any' claim, right, or interest to Mr. Wilday's interests.

Please feel free to contact me or have any of your agents contact me in regards to this matter.

Yours Truly,

/s/
Steve Urie
Chairman of the Board Of Directors

SU/nts

c: Douglas R. Brown, Stewart and Irwin

APPENDIX P

ARCHITECTS
PLANNERS
INTERIORS

PETER B. WILDAY, ARCHITECT
3710 Grant Dr., Reno, NV 99509
702-0844 Fax (702) 825-5568

April 5, 1994

Trooper Kelly Garrison
Department of Public Safety
Office of State Police
Riverboat Gaming Enforcement Division
Baton Rouge, LA 70821

RE: Jazz Enterprises, Inc.

Dear Trooper Garrison:

This letter is submitted to formally state that I have no interest in, have never had an interest in, nor promise of interest in Jazz Enterprises, Inc., applicant for a riverboat gaming license in Louisiana. Early in the planning process for this project, the possibility of receiving an interest in Jazz as compensation for my professional services were discussed. However, that possibility never materialized.

I submitted invoices to Jazz and have been paid in full for my design and consulting services.

The total payments amounted to a sum of $150,908.34.

I hope this clears the confusion resulting from comments attributed to me in Indiana. If any further information is required from me to resolve this matter, please inform.

Sincerely,

/s/
Peter B. Wilday, Architect

APPENDIX Q

Page 43

. . .

Lastly, Trooper Larry Bowmer of the Indiana Riverboat Gaming Division contacted Trooper Garrison and inquired about the Architect for the Jazz/Argosy project, Peter Wilday. It seems that Mr. Wilday is applying for a riverboat gaming license in the state of Indiana and advised Trooper Bowmer that he was a 7.5 % owner of the Catfish Queen Riverboat Partnership. Trooper Garrison advised Trooper Bowmer that his statement was the first advisal that Mr. Wilday had any interest what-so-ever in the partnership. Following an investigation into the matter, Mark Bradley the Vice-President and C. J. Blanche the Attorney of Jazz Enterprises advised that Peter Wilday positively had no ownership interest in the Catfish Queen in commendam and asked what was needed to clear up the matter. Trooper Garrison advised that a letter from Peter Wilday and Mr. Blanche stating Mr. Wilday had no ownership interest in the partnership and a personal contact to Trooper Bowmer from each would sufficiently clear up the matter. The letters were sent to Trooper Garrison and Trooper Bowmer was contacted. The incident was considered closed.

By Mr. Lambert:
Q. Mr. Urie, when I read that out, you were somewhat smiling as though there was more to the story. Can you tell me, is there more to the story than what I read in this press release?
A. Well, of course, there's much more than what sits in the press release, but I think that, yes, I think it was very disingenuous of Argosy to say that we had been unable to obtain financing because, in fact, they were the primary reason we were unable to obtain financing. And what was disingenuous about it was they were the ones that just eight months prior to this had been promising to be our financier and our banker and had done so very publicly to a number of people. So, yes, that right now causes a great deal of emotion because that's what the whole situation was, is that they held out the offer, and when we needed it, they took it back.
Q. And when you needed it, was that after the license had been issued or wasn't that during the time you were renovating Catfish Town?
A. Well, we ran out of money so that we could really be doing everything we needed to do, where we saw we were going to be running out of money in order to complete the project during the spring of '94. We were able to keep ourselves going through some monies that we personally had, I had, and monies that we had left over that were still unspent at that timer but by the time we got to November, there was no money.
Q. Well, so at a point in time you sort of saw that there was an end to the ability to obtain any

additional financing, whether that was from your personal – personal money but that you were going to need Argosy to modify the deal for you to complete the project; is that correct?
A. That's correct.
Q. And you said when you needed the money Argosy was not there and that they didn't deliver on the promise that they made to you months earlier.
A. That's correct.
Q. Did Argosy lead you to believe and Jazz to believe that the project that we saw in the letters to Perryman would be financed?
A. Yes.
Q. And did Argosy misrepresent to you that it would deliver or get that -- help you get that financing?
A. Yes, they did.
Q. Now did that -- did Argosy's misrepresentation to you cause you to make any -- make a misrepresentation that Jazz could build those projects when Argosy was going to pull the financing?
A. Yes.
Q. Do you believe – no, isn't it true that you believe that Argosy induced you to make promises that Jazz could not deliver?
A. I do believe that.
Q. Now let me ask you to turn to Tab 46. Mr. Urie, on December 2, '94 didn't the shareholders of Jazz agree to sell their interests in Jazz to Argosy?

No. 09-1387

In the Supreme Court of the United States

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.,

Petitioner,

v.

PERRYMAN CONSULTANTS, INC., M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, AND ARGOSY GAMING COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court has jurisdiction to determine the scope of statutory defenses to a state-law antitrust claim.

Whether the state court below correctly held that the *Noerr-Pennington* defense to antitrust liability applies where the defendant is alleged to have made misrepresentations in administrative proceedings, in circumstances where the reviewing court found, as a factual matter, that the defendant's challenged conduct did not "subvert the [agency's] decision-making process."

RULE 29.6 DISCLOSURE STATEMENT

Though the caption of this case includes four defendants, three of them (Jazz Enterprises, Catfish Queen Partnership in Commendam and Argosy of Louisiana, Inc.) were in bankruptcy proceedings at the time of the appeal in this case. As a result, the Louisiana First Circuit Court of Appeal's decision respected the stay resulting from the bankruptcy proceedings and does not address those three defendants. The First Circuit permitted the appeal to proceed as to Argosy Gaming Company, and undersigned counsel's representation in this Court is thus of Argosy Gaming Company. Occasional reference is made to "respondents" or "defendants" in the plural because those other three defendants were not in bankruptcy proceedings when the trial occurred.

Argosy Gaming Company is a Delaware corporation and is a wholly-owned subsidiary of Penn National Gaming, Inc., a publicly-held company.

Other persons affiliated with Jazz Enterprises, Inc., Catfish Queen Partnership in Commendam, and Argosy of Louisiana, Inc. are Mark Bradley, a Louisiana resident, and Ron Johnson and Steve Urie, Nevada residents, who were dismissed as defendants during the course of the litigation.

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JURISDICTION

Although petitioner asserts jurisdiction under 28 U.S.C. §1257(a), the Louisiana Court of Appeals disposed of this case on state law grounds. This Court accordingly lacks jurisdiction to hear the case.

STATUTORY PROVISIONS INVOLVED

The Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPL"), La. R.S. 51:1401 *et seq.*, is attached as an appendix to this brief.

STATEMENT OF THE CASE

In this case, a state intermediate appellate court applied principles borrowed from the *Noerr-Pennington* doctrine[1] to reject a *state-law* antitrust claim. This Court lacks jurisdiction to review that decision. Although the court below consulted and doubtless was influenced by federal law, state law controlled the outcome; the question decided below was one of state legislative policy concerning the scope of a state-law defense to a state-law cause of action. The case accordingly does not present a question of federal law.

In any event, even if jurisdiction in this Court does exist, the decision below would not warrant review. The court below issued a careful, well-considered analysis that is wholly consistent with this Court's *Noerr-Pennington* doctrine. Although petitioner asserts confusion in the lower courts on the question presented, the petition does not identify a single decision that is in conflict with the ruling in

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[1] The doctrine is identified with *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965).

this case. And although petitioner contends that the question presented is an important and recurring one, that claim is belied by the petition itself; every lower court decision it cites is more than a decade old, and most are much older than that. The question presented here accordingly does not warrant this Court's attention. The petition should be denied.

1. Because this case involves an antitrust claim that grows out of agency procedures, it may be helpful to describe in some detail the governing state administrative and judicial processes. In 1991, the Louisiana Legislature enacted the Louisiana Riverboat Economic Development and Gaming Control Act, La. R.S. 4:501 *et seq.* (subsequently renumbered in 1996 as La. R.S. 27:41 *et seq.*, but those changes are not relevant to the present dispute). See Pet. App. A54-A67. The Act contained the licensing process for those seeking to operate riverboat gaming casinos in Louisiana, and limited the maximum number of licenses that could be issued to fifteen. The Act also created the Gaming Enforcement Division within the Office of the Louisiana State Police, which was vested with comprehensive regulatory and enforcement authority. The Division is an independent body of decision-makers with exclusive statutory authority to grant or deny license applications. Applicants who were denied a license by the Division and "persons aggrieved" by the Division's decisions could appeal first to the Louisiana Riverboat Gaming Commission (also created by the Act in 1991) and then to the 19th Judicial District Court. The Louisiana Court of Appeal, First Circuit, has intermediate appellate jurisdiction over all final judgments of the District Court, and the Louisiana Supreme Court has discretionary review authority and

jurisdiction over all decisions of the Louisiana courts of appeal. La. Const. art. V, §§5, 10, and 10(B).

The licensing process was rigorous and comprehensive. To be eligible for a license, applicants and persons affiliated with them were required to be of good character and integrity, with no criminal record. Before issuing a license, the Division was required to review the license application, conduct such investigation as needed, and after a hearing, find that (1) the proposed financing outlined by a license applicant was adequate and from a suitable source; (2) the applicant had secured appropriate docking facilities; and (3) the applicant had demonstrated adequate financial ability to construct and maintain a riverboat of the type required by the Act. See generally Pet. App. A54-A67. If the applicant did not prove by "clear and convincing evidence"[2] that it was qualified, or if the applicant failed to provide "information and documentation to reveal any fact material to qualification," or if the applicant failed to supply truthful information "as to a material fact pertaining to the qualification criteria," the Act directed the Division not to award a license if the defect was not corrected.[3]

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[2] La. R.S. 27:28, Pet. App. A-54. This standard of evidence in the Act has particular importance in this effort by petitioner to involve the judicial system in this process. It took "clear and convincing evidence" on the part of an entity seeking a riverboat gaming license to prove that it was qualified, and respondents satisfied that exacting standard. Now, Capitol House wants the judicial system to apply a lower standard (preponderance of the evidence) to permit it to prove that a competing entity was "not qualified."

[3] The Division did allow amendments and revisions to correct submissions and actually allowed another competitor to disas-

2. By 1994, all but two of the fifteen authorized licenses had been issued. The two remaining licenses were "earmarked" for Baton Rouge, and three groups filed applications for those. They were: (1) Lady Luck Baton Rouge Casino, Inc.; (2) Catfish Queen Partnership in Commendam and Jazz Enterprises, Inc.; and (3) Louisiana Casino Cruises, Inc. The petitioner in this case, Capitol House, owned a minority ownership interest (38%) in the Lady Luck applicant; 62% of the ownership was held by Lady Luck Corp., a Las Vegas casino operator. Respondent Argosy Gaming Company was a partner with Jazz Enterprises, Inc. in the Catfish Queen Partnership project. See Pet. App. A3-A4.

The Division engaged an independent economist (Dr. Ray Perryman of Baylor University) to review each application and rank the three applicants according to the probable economic impact each would have on the state and local economies if a license were granted to it. See Pet. App. A4. Apart from the economic evaluation, the Division and the State Attorney General's office independently reviewed and investigated the information submitted by the applicants. The Division held three days of hearings. Each of the three applicants made a presentation at the hearing, although none of them was allowed to cross-examine witnesses. As described by the Louisiana appellate court in detail, during the lengthy licensing process Capitol House, on behalf of Lady Luck Baton Rouge, raised a number of questions concerning the ownership, financial condition, and truthfulness of Jazz and persons affiliated with it.

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sociate from one of its owners after the Division determined that person had a criminal conviction. App., *infra*, 29. The process was thus not as rigid as portrayed by petitioner.

The Division thoroughly investigated these allegations and nevertheless found Jazz suitable. See Pet. App. A31-A37.

Dr. Perryman ultimately ranked the development plan presented by Catfish Queen/Jazz first by a wide margin, the Casino Cruises project second, and the Lady Luck project a distant third. Pet. App. A4. In ranking the three proposed projects, Dr. Perryman considered what might happen "realistically," as opposed to what each application promised or represented would occur. Dr. Perryman determined that the economic effect of the Catfish Queen/Jazz project would be more than double that of Capitol House's project. On July 18, 1994, the Division awarded the two remaining licenses to Catfish Queen/Jazz and Casino Cruises, denying Lady Luck Baton Rouge's application. App., *infra*, 23; Pet. App. A4-A5.

In its written report, the Division concluded that the two successful applicants met the requirements contained in the Act and then cited Dr. Perryman's economic study, showing that those two projects would likely generate the most economic benefit to the region. App., *infra*, 12-15. In its reasons, the Division questioned Lady Luck Baton Rouge's ability to fund the project and expressed concern about potential delays of a year or more in obtaining the necessary permits and docking facilities, which unlike the two successful applicants, Lady Luck Baton Rouge had yet to obtain. App., *infra*, 14-15, 32.[4] Weighing

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[4] Lady Luck Baton Rouge did not own any property on the river nor any contractual rights affording it access to the river. See App., *infra*, 14. Whether it ultimately could obtain such rights was entirely speculative.

those concerns against its findings regarding the other applicants, the Division awarded the two remaining licenses to the other two applicants.[5] The Division declined to award a license to Lady Luck Baton Rouge, noting that the Division was unable under the Act to issue a final decision regarding Lady Luck Baton Rouge's suitability because no licenses were available and such a decision would be advisory only. App., *infra*, 24-30.

At this point, although the Act authorized Lady Luck Baton Rouge to appeal the denial to the Louisiana Riverboat Gaming Commission, there was no appeal by that entity.[6] Lady Luck (the owner of the controlling 62% interest) decided to abandon the project rather than appeal.[7] The disappointed applicant thus did not pursue the established administrative review process. After the deadline to appeal to the Commission had passed, Lady Luck sold its 62% interest in Lady Luck Baton Rouge to Capitol House for a nominal price ($620.00). Capitol House then executed a "reverse merger" with Lady Luck Baton Rouge, with Capitol House emerging as the surviving business entity. Capitol House then attempted to appeal the adverse decision to the judicial system in its

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[5] In a supplemental ruling requested by Lady Luck Baton Rouge after the denial of its license application, the Division found that Lady Luck Baton Rouge was "suitable," but expressly reiterated its prior findings and reasons for denying the application. App., *infra*, 31-33.

[6] Capitol House filed an appeal with the Commission in its own name, but because it was not the applicant the appeal was denied. See *Capitol House Preservation Co., L.L.C. v. The Louisiana Riverboat Gaming Commission*, 682 So.2d 1323 (La. App. 1st Cir.1996).

[7] *Ibid.*

own name, claiming to be a "person adversely affected" by the award of the two licenses to the competing projects. The 19th Judicial District Court rejected the appeal, however, and the First Circuit Court of Appeal affirmed, holding that a minority shareholder was neither the "applicant" nor a "person adversely affected" by the denial of the license application.[8]

3. Capitol House then filed suit for money damages, naming as defendants one of the winning license applicants and persons affiliated with it. Capitol House claimed that the defendants violated the LUTPL by making materially false and deceptive statements to the Louisiana riverboat licensing authority to induce it to issue a license to the Catfish Queen/Jazz group. Pet. App. A5. Capitol House claimed the misrepresentations should have disqualified the defendants and that, had they been disqualified, Lady Luck Baton Rouge would have received one of the licenses. Capitol House sought to recover the loss of its investment spent pursuing the license, the value of a gaming license, and any past and future lost profits that would have been derived from its hoped-for riverboat and related business projects, had Lady Luck received the license instead of Catfish Queen/Jazz.

After a trial, the jury rendered a verdict in the approximate amount of $3 million in favor of Capitol House, finding that the defendants violated the LUTPL by making material misrepresentations to

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[8] *Id.* at 1326. The First Circuit also held that only the applicant (Lady Luck Baton Rouge), which chose not to appeal, and not Capitol House, had standing "to challenge the denial of the license." *Ibid.*

the Division. But for the false and misleading statements, the jury found, Lady Luck Baton Rouge would have received a license. Pet. App. A6-A11.

On the defendants' appeal to the Louisiana Court of Appeal, First Circuit, the appellate court reversed. Pet. App, A2-A40. Noting that the LUTPL prohibits the same types of anticompetitive and deceptive conduct as does the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and that the state statute expressly permits conduct that complies with the FTC Act, the court explained that, "in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have applied the Federal Trade Commission Act to various types of conduct." Pet. App. A15. This aspect of state law required the court to consider the "antitrust law defense[] recognized by the federal courts" in the "*Noerr-Pennington* immunity doctrine," which precludes the imposition of antitrust liability for "anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government." *Id.* at A15, A16.

The state court accordingly canvassed the *Noerr-Pennington* decisions of this Court and the federal courts of appeals. Pet. App. A16-A22. It concluded that this Court's decisions "did not foreclose a misrepresentation or fraud exception to the Noerr-Pennington immunity doctrine when the misrepresentation or fraud occurred outside of the political arena" (*id.* at A22), so long as the "defendants' alleged misrepresentations subverted the entire decision-making process to the extent that the [agency] was effectively no longer the real decision maker." *Id.* at A26.

The court held, however, that petitioner could not make such a showing on the record here. After a detailed review of the record (Pet. App. A30-A37), the court found that the Division was aware of the issues relating to each of respondents' alleged misrepresentations and, exercising its informed discretion, nevertheless issued the license to respondents. The court accordingly concluded "that the defendants' misrepresentations and/or omissions, when considered independently or collectively, did not subvert the Division's decision-making process to the extent that the Division could not effectively evaluate the three proposed projects and make an informed decision as to which of the applicants should receive the two licenses." *Id.* at A37. The court found this "conclusion further supported by the fact that the Division, an independent body of disinterested decision-makers, did not take all representations at face value and it had the opportunity to review and investigate the information submitted by the applicants." *Ibid.* The court therefore held that petitioner's LUTPL claims must be rejected under the *Noerr-Pennington* doctrine.[9]

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[9] Petitioner had pointed to three alleged misrepresentations made by respondents. First, petitioner contended that the Jazz application listed an individual who had an ownership interest in Jazz as a director rather than an owner. The court found, however, that "Capitol House raised the specific issue regarding [this person's] ownership interest in Jazz during the course of the licensing proceedings"; that "[t]he Division investigated this specific allegation and was apparently satisfied with its findings"; and that "[t]he Division conducted the requisite background check on [this individual] as well as other Jazz shareholders and determined that they were all suitable." Pet. App. A30-A31. Second, petitioner alleged that the Jazz application failed to list respondents' contingent liabilities. The court found,

The court also rejected petitioner's contention that it had raised additional state-law tort claims not subject to a *Noerr-Pennington* defense. The court explained that "tort law claims based on allegations of intentionally false or misleading statements by the defendants to the Division are subsumed in the alleged violations of the UTPL." Pet. App. A37-A38. Alternatively, the court concluded that, even if petitioner's claims "could be considered outside the antitrust context," they would be barred under the Louisiana Supreme Court's holding in *Astoria Entertainment, Inc. v. DeBartolo*, 12 So.3d 956 (La. 2009), which ruled that acts of petitioning a state agency would not support liability unless they "rose to the level of criminality." Pet. App. A38.

The Louisiana Supreme Court denied petitioner's application for writ of review. Pet. App. A1.

ARGUMENT

Petitioner's arguments for review are flawed at every level. As a threshold matter, there is no federal jurisdiction in this case, in which the challenged decision determined the scope of a state-law defense to a state-law claim arising in state court. But review

however, that "the Division was aware of the amount owed"; that "Capitol House failed to show that the[] exclusion [of certain amounts from disclosure] was intentional"; and "that the Division was vested with discretion to decide what level of undisclosed debt the Division considered material for its licensing decision." *Id.* at A32-A33. Finally, petitioner alleged that respondents overstated their funding. The court found, however, that "the Division was aware of the allegations made against Jazz with regard to its ability to obtain financing"; that "Perryman, in ranking the three proposed projects, considered what might happen 'realistically' as opposed to what each applicant promised"; and that respondents' projections accordingly "did not subvert the decision-making process." *Id.* at A36-A37.

would be unwarranted even if this Court had jurisdiction. The decision below rests on an unexceptional application of this Court's precedents. And petitioner has not identified any other court that would find an exception to *Noerr-Pennington* immunity in circumstances like those in this case, where the defendant's alleged misstatements were made to a state agency that was empowered to, and did, make an independent examination of the facts underlying those representations. The petition accordingly should be denied.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE.

At the outset, the Court lacks jurisdiction to decide this case: the petition presents only a state-law question. This Court's jurisdiction to review final state-court judgments is constrained by 28 U.S.C. § 1257(a). And it is fundamental that, under section 1257(a), the Court may issue a writ of certiorari to a state court only when the "state court determination[] . . . rest[s] upon federal law." *Oregon* v. *Guzek*, 546 U.S. 517, 521 (2006); see also *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965) ("[W]e have no power to revise judgments on questions of state law.").

The decision below, however, rests on *state* law. The question in this case concerns – exclusively – the scope of liability under the LUTPL. Petitioner himself acknowledges as much; the petition notes repeatedly that "Petitioner has asserted only state law claims here." Pet. 19; see *id.* at 21 ("Petitioner has not asserted any antitrust claims here, but only

claims under Louisiana tort law."). On the face of it, there is no federal question here that would give this Court jurisdiction.

To be sure, a federal question may be involved when a state-law question is intertwined with one of federal law, or where state law in some sense incorporates federal law. See Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 212-13 (9th ed. 2007). And because the LUTPL is patterned on and refers to the FTC Act, the court below looked to federal decisions for guidance in reading a *Noerr-Pennington* analog into state law: as that court noted, Louisiana courts "may and should consider interpretations of the Federal courts and of the Commission relative to such similar statutes to adjudge the scope and application of our own statute." Pet. App. A15 n. 7 (quoting *Guste v. Demars*, 330 So.2d 123 (La. App. 1st Cir. 1976)).

But this is not a case where the state court even arguably *applied* federal law or recognized a right that is enforceable *as a matter of federal law*. *Compare, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-42 (1983). Instead, the central issue before the Louisiana courts below was the scope of a state antitrust statute, the LUTPL. While patterned after Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), the LUTPL nonetheless is a *state* law that prohibits firms engaged in trade or commerce in Louisiana from using "unfair and deceptive trade practices," of the type that could threaten free and fair competition in the marketplace in Louisiana. As a consequence, the *Noerr-Pennington* type of immunity approved by the Louisiana appellate court below was in all respects strictly a state-law defense to state-law claims. If the Louisiana Legislature de-

cided tomorrow to amend the statute to eliminate the *Noerr-Pennington* defense altogether, nothing would prevent it from doing so, regardless of federal law. For that reason, the question presented here is not federal in nature.

Were there any doubt on this point, the Court nevertheless should deny review as a prudential matter. To say the least, it would be extraordinary for the Court to settle the meaning of federal law in a state court action advancing only state-law claims, where the state court as a matter of its own discretion has looked to federal law for guidance. In such circumstances, this Court would be deciding an abstract and theoretical question were it to review the holding below, with no assurance that its decision would have any impact on the ultimate disposition of the case; after all, if this Court disagreed with the state court's understanding of *Noerr-Pennington*, that court would be free on remand to reject this Court's guidance and reinstitute its ruling as a mater of state law. A holding by this Court therefore would amount to little "'more than an advisory opinion.'" *Michigan* v. *Long*, 463 U.S. at 1042-43 (quoting *Herb*, 324 U.S. at 125). If the *Noerr-Pennington* question presented in the petition really is an important and recurring one, the Court will have ample opportunity to address it in a case from federal court that presents it directly as a matter of federal law.

II. THE LOUISIANA APPELLATE COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Even apart from the question of this Court's jurisdiction, this case does not warrant the Court's consideration. Although the petition's presentation is a bit muddled, it appears to advance two principal

grounds for review: that the court below "radically extended the *Noerr-Pennington* doctrine to protect intentional, material misrepresentations submitted to an agency acting solely as an adjudicatory body" (Pet. 11), ostensibly in conflict with this Court's decisions; and that the lower courts are divided on the application of *Noerr-Pennington* in such circumstances. *Id.* at 31-33. But petitioner is wrong on both counts. In fact, the holding below is wholly consistent with this Court's decisions, which have never recognized an exception for *Noerr-Pennington* immunity of the sort advanced by petitioner. And the petition does not identify any conflict between the decision below and the holdings of other courts that have applied *Noerr-Pennington* in circumstances like those of this case. For these reasons as well, the petition should be denied.

A. The Holding Below Is Consistent With This Court's Decisions.

1. The underlying principles that govern here are settled and uncontroversial. *Noerr* and subsequent decisions establish that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 56 (1993) ("*PREI*"). The Court has also recognized a limited "sham" exception to this immunity, which applies when the defendant invoked the processes of a court or agency in a manner that is *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and subjectively flawed in the sense that it is "'an attempt to interfere *directly* with the business relationships of a competitor' . . . through the 'use [of] the governmental *process* – as opposed to the *outcome* of that

process – as an anticompetitive weapon." *Id.* at 60-61 (emphasis in original) (quoting *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)).

Although the petition uses the term "sham" loosely in characterizing respondents' conduct, it is plain that the *Noerr-Pennington* sham exception recognized by this Court is not applicable here. "Sham" liability may be imposed only when both elements of the sham test are satisfied. But *neither* is satisfied in this case. The court below found that the Division knew of the defendants' alleged misstatements and awarded the license anyway; thus, respondents' action was not only objectively reasonable, it was *meritorious*. As for the subjective component of the test, the court below found that respondents, "in attempting to obtain a gaming license, sought to procure favorable governmental action and were not attempting to interfere directly with the business relationships of their competitors." Pet. App. A18.

Petitioner therefore must contend that this Court has fashioned a general "fraud" exception to *Noerr-Pennington* antitrust immunity that goes beyond the familiar sham doctrine and that comes into play whenever the antitrust defendant makes misleading statements to a governmental decision-maker. But on the face of it, that contention also is wrong. In fact, in *PRE*, which post-dates most of the decisions relied upon by Capitol House, the Court expressly stated it was *not* deciding "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61 n. 6. The Court has not revisited that question in the intervening years.

2. Petitioner nevertheless insists, improbably, that the decision below departs from this Court's precedent, relying principally on three decisions: *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508 (1972); *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988), and *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516 (2002). *See* Pet. 11, 16-19, 20-21.[10] But petitioner is wrong: those decisions are not in conflict with the holding of the Louisiana appellate court.

a. In *California Motor Transport*, a group of highway carriers routinely opposed their competitors' applications for operating rights in administrative and judicial proceedings, irrespective of the strength or weakness of any given application. The Court there recognized that the *Noerr-Pennington* doctrine should apply in the adjudicatory context: "[t]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510. In nevertheless finding support in *California Motor Transport*, petitioner relies on the Court's recognition that "[m]isrepresentations, con-

[10] Capitol House also cites *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in arguing that this Court has recognized a fraud exception to *Noerr-Pennington*. There, the Court held that enforcement of a patent procured by fraud on the Patent Office may be violative of §2 of the Sherman Act, 15 U.S.C. §2. Significantly, the Court based its decision on the strong public interest in the proper possession and enforcement of patent rights, which are lawful exceptions to the general rule prohibiting monopolies. Like *California Motor Transport* and *Allied Tube*, *Walker* pre-dates *PREI*.

doned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513. But the Court carefully limited this aspect of the "sham" exception, explaining that it comes into play when there is "a pattern of baseless, repetitive claims" that "effectively bar[] [the injured party] from access to the agencies and courts." *Id.* at 513. *See id.* at 515 (sham exception applies when defendants "harass and deter their competitors from having access to the agencies and courts"); 518 (Stewart, J., concurring in the judgment) ("the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent [their competitors] from invoking those processes").

That standard was not satisfied here, for two reasons. First, the state appellate court found that there was no abuse of the administrative process. The Division independently investigated all of the alleged misrepresentations, apparently decided they were immaterial, and then awarded the licenses on the basis of policy considerations: the two licensee casino projects had the best chance of producing favorable economic results for the region. Significantly, there was no trial or any other form of adversarial proceeding. Instead, a legislatively created board heard presentations from the potential licensees, vetted each of the licensees and their owners and financiers, and then issued licenses based on the expected economic benefit to the state of Louisiana. This is a standard based on considerations of policy, rather than an adjudicatory determination.[11]

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[11] The Act directed the Division to award licenses "if the issuance of a gaming license to the applicant is in the best inter-

Second, even if the process were deemed adjudicatory rather than an exercise of policy-making, the defendants' actions can hardly be considered "baseless" or "repetitive." The alleged misrepresentations were clearly intended to achieve a favorable result from the licensing board. Whereas the Court noted in *California Motor Transport* that the conspirators "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process" (404 U.S. at 512), the defendants in this case actually sought the gaming licenses – not to deny Lady Luck Baton Rouge access to the administrative process. Lady Luck Baton Rouge was heard by the Division, which, after considering the alleged misrepresentations, still decided to award the license to the Catfish Queen/Jazz project. See Pet. App. A31-A37. Because the Division was clearly aware of the alleged conduct that forms the basis of this suit prior to reaching a decision, the process has not been "abused" within the meaning of *California Motor Transport*.

b. The second decision invoked by petitioner, *Allied Tube*, was an antitrust suit brought by a plastic conduit manufacturer against steel conduit manufacturers after the defendants effectively stuffed the ballot box in a private electrical industry board's voting procedure. The vote was to set the private organization's safety standards. The defendants claimed *Noerr-Pennington* immunity because the private organization they fraudulently influenced would likely later influence political bodies that would adopt the private organization's standards. The voting members of the private board were parties that owned

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ests of the state and consistent with the intent of the legislature as expressed in this Chapter." Pet. App. A66.

companies in the industry, thereby giving each member a stake in the outcome of the proceedings. See 486 U.S. at 495-99. This Court's holding that the defendant was not shielded by *Noerr-Pennington* immunity was "expressly limited to cases where an 'economically interested party exercises *decision-making* authority in formulating a product standard for a private association that comprises market participants.'" 486 U.S. at 511 n.13 (emphasis in original). In those circumstances, "[w]hat distinguish[ed] th[e] case from *Noerr* and its progeny is that the context and nature of [the defendant's] activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.* at 505. *See id.* at 506 (emphasizing that the challenged activity took place "within the confines of a private standard-setting process").

The instant case is nothing like *Allied Tube*. Here, the license applicants petitioned a legislatively created licensing board composed of disinterested members of the Office of the Louisiana State Police. Moreover, while this Court recognized in *Allied Tube* that a "misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena," we have noted that a legislatively created board weighing a discretionary decision does not function in an adjudicatory manner. *See* 486 U.S. at 504. Capitol House itself quotes *Allied Tube*'s premise that "the *Noerr* immunity of anticompetitive activity intended to influence the government depends not on its impact, but also on the context and nature of the activity." Pet. 17 (quoting 486 U.S. at 504). And that context here points in favor of immunity.

c. In *BE&K*, the third decision cited by petitioner, the Court acknowledged that *Noerr Pennington* immunity can exist in contexts outside of antitrust law, applying it to the National Labor Relations Act. *BE&K*, 536 U.S. at 526. That holding is completely irrelevant to the instant case, as the LUTPL is a state antitrust law. See Pet. App A14, A15, A24. *BE&K* also applied the two-part sham test articulated by the Court in *PREI* (see 536 U.S. at 526) – but, as we have explained, the sham exception has no application here. *BE&K* therefore adds nothing to petitioner's case.

At bottom, the exercise undertaken by the Louisiana court mirrored the appropriate analysis this Court described in *California Motor Transport*. This Court observed that the issue that should be addressed is whether "the administrative and judicial processes have been abused," which "may be a difficult line to discern and draw." 404 U.S. at 513. Here, the Louisiana appellate court drew that line, found that the process had *not* been abused, and determined that the license applicant in which Capitol House had an interest was not barred from access to the agencies and courts. That holding was correct and need not be reviewed by this Court.[12]

[12] The conclusion that *Noerr Pennington* immunity applies here is supported by the Federal Trade Commission's opinion in *In the Matter of Union Oil Co. of California*, FTC Docket No. 9305, 2004 WL 1632816 *11 (F.T.C. 2004), which thoroughly addressed the state of the law regarding a "fraud or illegal conduct" exception to *Noerr-Pennington*. The Commission identified a number of factors that must be balanced in determining whether a party's misrepresentations to an administrative or judicial body are sufficient to justify recognizing an exception to *Noerr Pennington* immunity. Of particular importance here,

B. There Is No Conflict In The Circuits.

Petitioner also is incorrect in asserting that the lower courts are in disarray on the approach to a "fraud" exception to *Noerr Pennington*. The decisions cited by petitioner in support of this proposition are all more than a decade old, predating this Court's more recent *Noerr-Pennington* holdings. And petitioner does not, in any event, cite any decision of any court declining to recognize *Noerr-Pennington* immunity in circumstances like those of this case, where the challenged statements were made to an agency that conducted a full and independent determination after becoming aware of the allegations of falsity. There accordingly is no need for review by this Court.

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the Commission recognized that "the scope of immunity depends on the degree of political discretion exercised by the government entity," quoting *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1062 (9th Cir. 1998), cert. denied, 525 U.S. 1140 (1999). It also regarded as relevant the extent to which the government agency necessarily relied upon the defendant's factual assertions and the court's ability to establish a causal link between the wrongful conduct and ensuing government action. *Union Oil*, *supra*, at *20-21. In that context, the Commission explained why it made sense that there should be immunity where an agency has the "practical ability to probe behind petitioner's assertions," as in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3rd Cir. 1999), cert. denied, 530 U.S. 1261, or where there was no causal connection between the government's decision and the misrepresentations, as in *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3rd Cir.), cert denied, 528 U.S. 871 (1999). Here, all of those considerations support immunity: the Division exercised broad discretion, was authorized to and did look behind the parties' factual assertions, and (for that reason) there was no causal link between the alleged misrepresentations and the Division's license decisions.

1. There is one federal appellate decision that parallels this case in nearly all respects, *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3rd Cir. 1999), cert. denied, 530 U.S. 1261. As petitioner itself recognizes (Pet. 32), that decision is fully consistent with the holding below in this case.

In *Armstrong*, the Third Circuit recognized that *Noerr-Pennington* immunity extends to parties alleged to have deceived state regulators so as to preserve their monopoly over outpatient surgery. The defendant hospital was the only hospital with operating rooms in Armstrong County, with the closest independent surgical center fifty miles away. The plaintiff planned to build a directly competing outpatient facility. Pennsylvania law required the state Department of Health to issue a certificate of need before approving the construction of a new surgical facility. See 185 F.3d at 155-56.

To preserve its monopoly, the defendant hospital sought to influence the Department's decision regarding the issuance of such a certificate to the plaintiff. The hospital's staff physicians falsely represented to the Department that they planned to boycott the plaintiff's proposed facility. The hospital also claimed that it was building its own outpatient surgical center, even though that center's construction had ceased and was not expected to resume. The Department denied the plaintiff's request for a certificate of need, reasoning that a new center would be duplicative of current facilities and ineffective because of the planned boycott. The plaintiff sued under the Sherman Act, alleging a conspiracy to prevent it from establishing an outpatient surgery center. See 185 F.3d at 156-57.

Relying on this Court's decision in *Omni Outdoor Advertising*, the *Armstrong* court held that even when private persons induce government action through misrepresentation, the activity remains within the *Noerr-Pennington* immunity:

> Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision-making process. The remedy for such conduct rests with the laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs.

Armstrong, 185 F.3d at 162. The court in *Armstrong* also reasoned that *Omni Outdoor Advertising* required dismissal "given the conceded presence [in *Armstrong*] of disinterested decision-makers, an independent investigation, an open process, and extensive opportunities for error correction." *Id.* at 164. All of those considerations are present here, and the court below relied on them – and on *Armstrong* – in rejecting petitioner's claim. See Pet. A26.

2. Although *Armstrong* is on all fours with this case, the assertedly conflicting decisions cited by petitioner (at Pet. 32) are not: all differ from this case in material ways. In *Kottle* v. *Northwest Kidney Center*, 146 F.3d 1056 (9th Cir. 1998), cert. denied, 525 U.S. 1140 (1999), the court recognized a sham exception to *Noerr-Pennington* when misrepresentations to a court or agency were so extreme that "the entire [agency] proceeding was deprived of its legitimacy" (*id.* at 1063); but for the reasons explained by the court below (at Pet. App. A-37), that standard is

not satisfied here. In *St. Josephs Medical Center* v. *City Hospital Ass'n*, 795 F.2d 948, 955 (11th Cir. 1986), the court opined that misrepresentations to an agency ruling on applications for benefits are not immune from liability, but there was no indication in that case (unlike this one) that the agency was able to make an independent determination notwithstanding the misstatements. *See id.* at 952. The same was true in *Potters Medical Center* v. *City Hospital Ass'n*, 800 F.2d 568, 580-81 (6th Cir. 1986) – where, in addition, the plaintiff's claim was *rejected* on *Noerr-Pennington* grounds because the defendant denied knowing falsity. *Id.* at 581. And in *Armstrong*, the Third Circuit itself explained that *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), cert. denied, 528 U.S. 871 (1999), has no application where, as here, "the plaintiff affirmatively alleges that defendants' purpose was to secure the *outcome* of the process" (185 F.3d at 159 n.2 (emphasis in original)); *Cheminor* refused "to carve out a new exception" to *Noerr-Pennington* immunity that extended beyond the limits of the sham exception. 168 F.3d at 123.[13]

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[13] Petitioner also finds support in the Fifth Circuit's forty-year-old decision in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972). See Pet. 28-29. But there is no merit to that argument. In *Woods*, the court rejected a *Noerr-Pennington* defense to the claim that the defendant submitted false data to an administrative agency because, once the submissions had been made, there was "no opportunity for meaningful supervision or verification" of them. 438 F.2d at 1295. The court found that the agency relied on the truthfulness of the private parties that submitted data and often accepted their estimates at face value without investigation. In that setting, the court concluded that the agency "neither was

Because there was no square conflict in the lower courts, the United States and the FTC jointly *opposed* the petition for certiorari in *Armstrong*. See No. 99-905, *Armstrong Surgical Center, Inc.* v. *Armstrong County Mem. Hosp.*, Br. for the United States and the Federal Trade Commission as Amici Curiae ("U.S. *Armstrong* Br."). Discussing each of the decisions cited by petitioner in this case, the United States and FTC noted that, although these decisions were "in some tension with [*Armstrong*]," "[m]ost of the cases cited were decided before *PREI* and *Omni*, which may . . . account for a good deal of that tension." *Id.* at 15. The United States and FTC likewise noted that "[t]he cited cases are also distinguishable from[*Armstrong*] on their facts." *Ibid.* And they added that, "[s]o far as we are aware, no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where the action was allegedly procured by the defendant's fraud." *Ibid.* The United States and FTC therefore concluded that, "although future cases may reveal a conflict that will call for intervention by this Court, whatever difference in approach currently exists does not demand review in this case" (*id.* at 16); "there is no direct conflict among the circuits on the question presented here, and any apparent divergence in the reasoning of the lower courts does

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the real decision maker nor would have intended its order to be based on false facts." *Ibid. See Armstrong*, 185 F.3d at 164, n.8. Here, in contrast, the court below expressly premised its decision on its conclusion that "the Division, an independent body of disinterested decision-makers, did not take all representations at face value and . . . had the opportunity to review and investigate the information submitted by the applicants." Pet. App. A37.

not require immediate review by this Court." *Id.* at 20.

The United States and FTC also identified additional considerations that militated against review in *Armstrong* – and that do so here, as well. They explained that "[t]he Court's decisions counsel caution in fashioning any theory of antitrust liability that would allow a plaintiff to recover damages from a private defendant for competitive injuries caused most directly by state administrative or adjudicatory action, such as the denial of a [license]." U.S. *Armstrong* Br. 16. They noted that "[t]he inquiry involved in substantiating or repudiating such a claim may involve 'look[ing] behind the actions of state sovereigns' in a way this Court has disfavored." *Id.* at 17 (quoting *Omni Outdoor Advertising*, 499 U.S. at 379). They observed that "there are presumably other remedies" available for abuse of state administrative and judicial processes." *Id.* at 18. "And even if such concerns could be mitigated or overcome," they added, "it is open to question whether the vindication of plaintiffs' rights in whatever number of cases proved both adjudicable and meritorious would adequately reward the judicial effort that would be involved in crafting and administering antitrust doctrine in this delicate area, and the private expense involved in litigating any claims that would ultimately be rejected." *Ibid.*

Given those considerations, the United States and FTC concluded that, "[b]ecause the question is difficult, the number of potentially relevant factual variables large, and the present appellate authority sparse and somewhat dated, . . . review by this Court should await the illumination of further experience with such claims in the courts of appeals." U.S.

Armstrong Br. 20. That same conclusion remains true today. In the years since the government opposed review in *Armstrong*, this Court has not revisited whether, or in what circumstances, misrepresentations to agencies or courts fall outside *Noerr-Pennington* immunity. And petitioner has not pointed to *any* relevant antitrust decision in the courts of appeals that post-dates *Armstrong*. The existing appellate authority addressing the issue presented here therefore is just as "sparse," and much *more* "dated," than it was when the government opposed (and the Court denied) review in *Armstrong*. The same outcome is appropriate here.[14]

Finally, the United States and the Federal Trade Commission also pointed to one additional consideration that militated strongly against review in *Armstrong*, and does so here as well: although "[t]he need for circumspection is . . . plain," "this case does not appear to be one in which the argument for liability can be advanced forcefully." U.S. *Armstrong* Br. 19. As in *Armstrong*, here the agency "process is administrative, and in some respects adjudicatory, but it also has aspects that are 'political' in the *Noerr* sense." *Ibid.* (citation omitted). Also as in *Armstrong*,

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[14] One of the secondary authorities cited by petitioner (at Pet. 33) notes that the Court has "routinely denied certiorari to review the most important decisions in the courts of appeals considering whether, and if so, in what circumstances, antitrust liability may be imposed for the anticompetitive effects of government action induced by fraud." The author added that "the Solicitor General was on solid ground in urging a cautious approach on this difficult issue" in recommending against review in *Armstrong*. Floyd, *Antitrust Liability for the Anticompetitive Effects of Government Action Induced by Fraud*, 69 Antitrust L.J. 403, 408, 410 (2001).

here "[t]he process . . . featured 'an independent investigation, an open process, and extensive opportunities for error correction." *Id.* at 19-20 (citation omitted). Even more than in *Armstrong*, it is doubtful that in this case the agency's "decision depended on the alleged misrepresentations"; "there is no indication that petitioner ever sought clarification of that point, or asked the [agency] to reconsider and reverse its decision on grounds of fraud." *Id.* at 20. As in *Armstrong*, then, petitioner "is not well placed to argue that it was 'bar[red] from meaningful access to adjudicatory tribunals,' or that respondents effectively 'usurp[ed]' the legitimate public 'decisionmaking process.'" *Ibid.* (quoting *California Motor Transp.*, 404 U.S. at 20). And because this case has the additional drawback of involving a state court's resolution of a state-law claim, it presents a *uniquely unfavorable* vehicle with which to address the question presented, even assuming that question otherwise would warrant the Court's attention. For all of these reasons, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 14, 2010

LSA – R.S. 51, § 1401. Short title

This Chapter shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

LSA – R.S. 51, § 1402. Definitions

As used in this Chapter, the following words and phrases shall have the meanings hereinafter ascribed to them:

(1) "Consumer" means any person who uses, purchases, or leases goods or services.

(2) "Consumer interest" means those acts, practices, or methods that affect the economic welfare of a consumer.

(3) "Consumer transaction" means any transaction involving trade or commerce to a natural person, the subject of which transaction is primarily intended for personal, family, or household use.

(4) "Disabled person" means a person with a mental, physical, or developmental disability that substantially impairs that person's ability to provide adequately for his own care or protection.

(5) "Documentary material" means the original or a copy of any book, record, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

(6) "Elder person" means any person sixty-five years of age or older.

(7) "Examination" of documentary material includes the inspection, study, or copying of any such material and the taking of testimony under oath or acknowledgment in respect to any such documentary material or copy thereof.

(8) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity.

(9) "Trade" or "commerce" means the advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state.

(10) "Knowingly" means that the act or practice used was such that a reasonably prudent businessman knew or should have known that the act or practice was a violation of this Chapter.

LSA – R.S. 51, § 1405. Unfair acts or practices; interpretation and rulemaking authority

A. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

B. The attorney general may make rules and regulations interpreting the provisions of this Chapter consistent with the provisions in R.S. 51:1 through 461.1. Such rules and regulations shall be adopted in the form and manner prescribed by R.S. 49:951 et seq. The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the parish in which the division is located or in the parish in which the plaintiff resides or is domiciled. Appeals may be had from any ruling of a district court in accordance with the Code of Civil Procedure, except that such appeals shall be given preference and heard in priority to other appeals.

LSA – R.S. 51, § 1406. Exemptions

The provisions of this Chapter shall not apply to:

(1) Any federally insured financial institution, its subsidiaries, and affiliates or any licensee of the Office of Financial Institutions, its subsidiaries, and affiliates or actions or transactions subject to the jurisdiction of the Louisiana Public Service Commission or other public utility regulatory body, the commissioner of financial institutions, the insurance commissioner, the financial institutions and insurance regulators of other states, or federal banking regulators who possess authority to regulate unfair or deceptive trade practices.

(2) Acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or

television station or other advertising medium in the publication or dissemination of an advertisement when the publisher, owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement and did not have any direct financial interest in the sale or distribution of the advertised product or service.

(3) No seller of any product or service who disseminates any advertisement or promotional material in this state shall be liable under this Chapter if he receives the advertisement or promotional material from a manufacturer, packer, distributor, or other seller from whom he has purchased the product or service unless he refused on the request of the attorney general to provide the name and address of the manufacturer, packer, distributor, or other seller from whom he has purchased the product or service and said seller also agrees to enter into an assurance of voluntary compliance as prescribed by this Chapter from disseminating any such advertisement or promotional material thereafter. This exemption does not in any way limit the right of action any consumer may have under this Chapter.

(4) Any conduct which complies with section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C., 45(a)(1)], as from time to time amended, any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations.

LSA – R.S. 51, § 1409. Private actions

A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.

B. Upon commencement of any action brought under Subsection A of this Section, the plaintiff's attorney shall mail a copy of the petition to the attorney general, and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general, but failure to conform with this Subsection shall not affect any of plaintiff's rights under this Section.

C. Any permanent injunction, judgment or order of the court made under R.S. 51:1407 and R.S. 51:1408 shall be prima facie evidence in an action brought

under R.S. 51:1409 that the respondent used or employed a method, act or practice declared unlawful by R.S. 51:1405 or by rule or regulation promulgated pursuant thereto; provided, however, that this subsection shall not apply to consent orders or voluntary assurances of compliance.

D. If any person is enjoined from the use of any method, act, or practice or enters into a voluntary compliance agreement accepted by the attorney general under the provisions of this Chapter, such person shall have a right of action to enjoin competing businesses engaged in like practices.

E. The action provided by this section shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action.

[SEAL] **STATE OF LOUISIANA**
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS

PUBLIC SAFETY SERVICES

EDWIN W. EDWARDS
GOVERNOR

COL
PAUL W. FONTENOT
DEPUTY SECRETARY

July 18, 1994
3650/0248/MP/0004/SAQ

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Re: Notice of Decision

Gentlemen:

The Division has rendered its decision on the applications of Catfish: Queen Partnership in Commendam/ Jazz Enterprises, Inc., Louisiana Casino Cruises, Inc., and Lady Luck Baton Rouge Casino, Inc.

Enclosed is a copy of the Division's Reasons for Ruling and the Division's orders in this matter.

Thank you for your attention to this matter.

Sincerely

/s/ Lt. Marcal Poullard

Lt. Marcal Poullard
Supervisor
Riverboat Gaming
Enforcement Division

c. Stephen A. Quidd

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC. AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVERBOAT IN BATON ROUGE

REASONS FOR RULING

A public hearing was conducted by the Riverboat Gaming Enforcement Division of the Office of State Police to consider the applications of Lady Luck Baton Rouge Casino, Inc., Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam/ Jazz Enterprises, Inc., for the two remaining licenses to conduct gaming activities on riverboats in the State of Louisiana. This hearing was conducted over a three day period: Thursday, July 7, 1994; Friday, July 8, 1994; and Monday, July 11, 1994. This hearing was conducted pursuant to the authority contained in the Louisiana Riverboat Economic Development and Gaming Control Act, R.S. 4:501 et. seq, and particularly R.S. 4:533.

A. PROCEDURE

A meeting was held Friday, June 24, 1994 with the attorneys for the three applicants and the attorneys for the Division. This meeting was held to discuss the procedure that would be followed during the hearing.

The order of presentation by the three applicants was determined by a representative of each applicant selecting a sheet of paper with the number one, two, or three written on it. Lady Luck drew number one and thus was to go first. Louisiana Casino Cruises drew number two and was to go second. Catfish Queen drew number three and was to make the last presentation. Each applicant would be given three hours to make its presentation to the Division's panel. The Division's presentation was to be included in this three hour period.

Dr. Perryman was scheduled to give his presentation on Friday, July 8, 1994, at 1:30 p.m. Dr. Perryman would deliver his report to the Division at that time and copies of the report would be made available to each of the applicants.

It was agreed among the parties present at the meeting held on June 24, 1994 that each applicant would be given one hour to present evidence in rebuttal to Dr. Perryman's report on Monday, July 11, 1994. The order of the presentations would be in inverse order to the ranking in Dr. Perryman's report.

A letter was sent to each applicant following this meeting. This letter addressed the topics discussed at the June 24, 1994 meeting. This letter stated among other things that each presentation should address all aspects of the applicant's qualifications to receive a license as is contained In the Louisiana Riverboat Economic Development and Gaming Control Act and

that each applicant bore the burden of proof regarding their respective applications for a license.

No objections were made to this procedure until Monday, July 11, 1994, at which time Lady Luck filed a motion to continue the hearing. A ruling on the motion was deferred until the conclusion of the rebuttal portion of the hearing, at which time, the motion to continue was denied for the oral reasons that were read into the record.

The matter was taken under advisement and the hearing was adjourned at the conclusion of the proceeding on Monday, July 11, 1994.

While this matter was under advisement, Lady Luck's attorney sent a correspondence to the panel requesting that the hearing be reopened. This correspondence appeared on its face to be an ex parte communication, therefore the panel took no action in response to the correspondence. These facts were communicated to the attorneys for each applicant by a correspondence from the Division's attorney.

Lady Luck subsequently filed a formal motion to reopen the hearing. This motion incorporated the request contained in the correspondence sent to the panel and added two additional grounds. This motion was filed with Division on Friday, July 15, 1994. The Division's attorney requested the representatives of Louisiana Casino Cruises and Catfish Queen file their opposition to the motion to reopen the hearing. Louisiana Casino Cruises filed an opposition with the Division on the same day.

An order was signed on the afternoon of Friday, July 15, 1994 denying Lady Luck's motion to reopen the hearing.

B. FINDINGS OF FACT

1. EVALUATION OF APPLICANTS BY PERRYMAN CONSULTANTS, INC.

Dr. Perryman's report ranked the three applicants for the two Baton Rouge licenses in terms of economic impact as follows:

1. Catfish Queen Partneship [sic] In Commendam/ Jazz Enterprises, Inc.

2. Louisiana Casino Cruises, Inc.

3. Lady Luck Baton Rouge Casino, Inc.

This ranking is based on the evaluation performed by Perryman Consultants, a copy of which was introduced into evidence. The scope of this study was limited to the ranking of the three applicants based on their economic impact. This report did not address the desirability of gaming activities in Baton Rouge nor did it address the number of licensed gaming establishments which could successfully compete in the Baton Rouge market.

Dr. Perryman's evaluation considered only the new net economic impact that each of the applicants would have on Baton Rouge and state markets.

Extensive source materials were used by Dr. Perryman in conducting this evaluation. This fact is

reflected by the list on pages 11 and 12 of the report as well by Dr. Perryman's testimony.

Dr. Perryman assigned probabilities to each phase contained in the respective applicants' proposals. The probabilities reflected the likelihood of the investment in the applicant's project and the time frame in which the investment is likely to occur. Dr. Perryman's use of these assigned probabilities appear appropriate and the use of these probabilities is supported by other evidence in the record.

Dr. Perryman assigned high probabilities to the riverboats. In each case, the applicant has begun construction of its riverboat. As another example, Dr. Perryman assigned slightly lower probabilities to the hotels proposed by two of the applicants. The hotel proposed by Catfish Queen is contained in a later phase of their development and the hotel proposed by Lady Luck will require extensive and probably lengthy renovations because of its abandoned state.

The data used by Dr. Perryman was submitted to the respective applicants for final review, modification and approval. Each applicant, therefore, had significant input into the numbers used in Dr. Perryman's evaluation even though one applicant now contends the numbers used have caught them by surprise.

The record contains other evidence which supports the ranking of the three applicants.

The evidence adduced during the presentation by Louisiana Casino Cruises indicates that Baton Rouge will depend heavily on the local market for its gaming patrons. This evidence was introduced before the Division or any of the applicants heard Dr. Perryman's presentation. This corroborates Dr. Perryman's evaluation that Baton Rouge will depend heavily on the local market.

The applicants ranked number one and two will be able to commence operations at least several months before Lady Luck can possibly commence operations. These earlier commencement dates mean a quicker positive impact on the Baton Rouge and the state economy. Although Lady Luck projects a start up some time in December, Lady Luck does not have any of the necessary permits to conduct operations in and along the Mississippi River. Considering all of the problems that can arise in a licensing or permitting process, Lady Luck's operations could be delayed anywhere from six to twelve months.

There could be additional delays regarding docking facilities as is reflected by the proposed condition the Division was considering for Lady Luck if they were to be licensed.

Finally, delays may arise in connection with Lady Luck's financing. The Lady Luck Gaming Corporation has pledged to provide the financing for the project from funds the company had raised for other projects. The filings Lady Luck made with the Securities Exchange Commission do not include the Baton Rouge

project in its list of proposals. The Lady Luck Gaming Corporation may encounter difficulties with its investors or the federal government before any of this money is successfully diverted to the Baton Rouge, project.

The assumptions and statistics used by Dr. Perryman are appropriate and are reasonable in light of the corroborating evidence in the record. Further, the rankings are consistent with the other evidence presented at the hearing. Finally, Dr. Perryman's evaluation is more credible than that of Lady Luck's economist. Dr. Perryman has no interest in the outcome of this hearing. The other economist were [sic] retained by Lady Luck with the intent of advancing Lady Luck's interest.

Dr. Perryman's evaluation of the economic impact of the three applicants was conducted pursuant to the specifications of the Division and it is appropriate to consider the report in the licensing decision. Dr. Perryman's evaluation is entitled to greater weight than the testimony and reports submitted by the economist appearing on behalf of Lady Luck.

2. SUITABILITY

The suitability of the applicants ranked number one and two has been established by the evidence introduced at the public hearing.

a. CATFISH QUEEN LIMITED PARTNERSHIP/JAZZ ENTERPRISES, INC.

The qualifications of this applicant were addressed by the testimony of Senior Trooper Kelly Garrison, Jim Dogans, Earl Millet, and the presentation of Catfish Queen/Jazz.

The testimony presented by the Division reveals that there are no discrepancies which would disqualify the applicant as provided in R.S. 4:530 and 531. The testimony reflected that the applicant had the necessary gaming experience, the necessary financing and a designated docking facility.

All persons associated with the applicant have been found to be suitable. Trooper Garrison specifically testified there are no persons who the Division feels should divest themselves of their interest in the applicant. (Hearing Transcript, July 8, 1994, page 11, line 25 through page 12, line 7).

Argosy is the general partner of Catfish Queen Partnership In Commendam, thus Argosy will be primarily responsible for the gaming operations. Argosy is currently licensed in Illinois. Argosy has no record of any criminal or administrative violations relating to their gaming operations. Therefore, Argosy has the experience necessary to conduct gaming activities. (Hearing Transcript, July 8, 1994, page 12, lines 8 through 23).

Earl Millet of the Department of Revenue and Taxation testified that there were no factors or

concerns which could preclude a finding of financial suitability. (Hearing Transcript, July 8, 1994, page 17, line 5 through line 23). The Department of Revenue and Taxation also verified funds in excess of fifty million dollars ($50,000,000) were available to finance and finish this project. (Hearing Transcript, July 8, 1994, page 18, line 25, through page 19, line 4).

Trooper Garrison's testimony also reflects the applicant has designated a docking facility. (Hearing Transcript, page 11, lines 16 through 20). The docking facility has been approved by the Coast Guard and the Corp of Engineers. (Hearing Transcript, July 8, 1994, page 64, line 2 through line 15).

The applicant's presentation reveals that the applicant has the necessary marine experience and a plan to train and upgrade minorities in employment. The applicant also presented the plans for its riverboat and for its internal controls. (Internal controls are addresses in R.S. 4:531).

The applicant's presentation reveals that Argosy has extensive experience as a riverboat operator. Further, they have retained a local marine operator with extensive experience to handle the operation of the riverboat. (Hearing Transcript, page 36, line 11, through page 40, line 8).

A plan to train and up grade [sic] minorities was presented to the Division. (Hearing Transcript, July 8, 1994, page 45, line 24, through page 48, line 20; and page 66, line 5, through page 67, line 4). This

plan addressed both minority employment and minority business participation.

The internal controls were submitted to the Division on Thursday, July 7, 1994. (Hearing Transcript, July 8, 1994, page 65, lines 10 through 17).

The riverboat design has been submitted by the applicant. (Hearing Transcript, July 8, 1994, page 40, line 9, through page 41, line 1).

This applicant is found to have met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act and its qualified to receive a license.

b. LOUISIANA CASINO CRUISES

The qualifications of this applicant were addressed by the testimony of Trooper Joyce Thibodaux, Anthony Hamilton, Jean Spriggs and the presentation of Louisana [sic] Casino Cruises.

The testimony presented by the Division reveals that there are no discrepancies which would disqualify the applicant as provided. in R.S. 4:530 and 531. The testimony reflects that the applicant, has the necessary gaming experience, the necessary financing and a designated docking facility.

The applicant's presentation reveals that the applicant has the necessary marine experience and a plan to train and upgrade minorities in employment. The applicant also presented the plans for its

riverboat and for its internal controls. (Internal controls are addresses in R.S. 4:531).

Trooper Thibodaux testified all persons associated with the applicant have been determined not to be subject to any concerns or discrepancies which could serve to disqualify the applicant. (Hearing Transcript, July 7, 1994, page 187, line 11, through page 188, line 7). There was one person associated with Capitol Lakes Properties, the lessor of the land for the docking facility, over whom the Division expressed concern. John Pete Clements, who owned approximately nine per cent of Capitol Lakes Properties, was convicted of tax evasion and lying to the IRS. This person has agreed to divest himself of any interest he has in Capitol Lake Properties. (Hearing Transcript, July 7, 1994, page 188, line 4, through page 189, line 19).

Anthony Hamilton testified concerning the applicant's financial ability to construct and operate its facilities. The applicant has interim financing of ten million dollars ($10,000,000.00) from Carnival Hotels and Casinos. A fifty-one million dollar ($51,000,000.00) bond offering with warrants was placed through Salomon Brothers and Oppenheimer. This financing covers the projected cost of the project, sixty-one million dollars ($61,000,000.00). Hearing Transcript, July 7, 1994, page 183, line 2, through page 185, line 3; and page 193, line 4, through line 13).

The ownership of Louisiana Casino Cruises, Inc. consist of Thomas Mechan, Dan S. Meadows, Jerry

Balyes, and Carnival Hotels and Casinos. Carnival Hotels and Casinos is the majority owner of the applicant. Carnival Hotels and Casinos was created from the gaming businesses contained in Carnival Cruise Lines which includes approximately twelve shipboard casinos. (Hearing Transcript, July 7, 1994, page 178, line 14, through page 181, line 5). These facts establish the applicant is capable of conducting gaming operations.

The applicant has the ability to operate a riverboat as Carnival hotels and Casinos' parent company, Carnival Cruise Lines operates a large number of ocean going vessels. The applicant has hired several experienced people to handle its marine operations, and it has worked closely with the Coast Guard to insure [sic] the applicant's operations are in compliance with the appropriate laws and regulations. (Hearing Transcript, July 7, 1994, page 205, line 4 through line 22; and page 231, line 8 through page 235, line 5).

The plans for the riverboat were submitted to the Division and described in the testimony presented by the Division and the applicant. (Hearing Transcript, July 7, 1994, page 181, line 6, through page 182, line 23; and page 209, line 9, through page 210, line 6).

The applicant has designated a docking facility on the Mississippi River across from the state capitol. (Hearing Transcript, July 7, 1994, page 181, line 6, through line 19; and page 210, line 7, through line 21). The land for the docking facility is being leased from Capitol Lake Properties.

The applicant has developed a good faith plan to recruit, train, and upgrade minorities. The applicant's work force currently consist of thirty-nine per cent (39%) black and fifty-two per cent (52%) women. (Hearing Transcript, July 7, 1994, page 226, line 5, through page 230, line 13).

The applicant has developed a good faith plan to provide the maximum practical opportunities for the broadest possible participation of minority businesses. The applicant has developed a minority advisory board to promote these opportunities. (Hearing Transcript, July 7, 1994, page 243, line 4, through page 250, line 21).

The applicant had submitted its internal controls to the Division several weeks prior to the hearing. The applicant's presentation provided a brief description of the personnel who would be responsible for the riverboat's internal controls. (Hearing Transcript, July 7, 1994, page 221, line 5, through page 225, line 21).

This applicant is found to have met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act and is qualified to receive a license.

c. LADY LUCK BATON ROUGE CASINO, INC.

Since the applicants ranked number one and number two in the Perryman Consultant's study have

met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act, it is not necessary to make a ruling on this applicant's suitability at this time.

Since a public hearing was held on Lady Luck's application, R.S. 4:533 requires the Division to either grant or deny a license. Any ruling on suitability when a license is denied would serve no purpose.

Any such ruling would only be of an advisory nature. If a license were to become available in the future, the applicant would have to reapply with the Division. The Division would have to reevaluate the applicant's suitability for a license at that time.

C. LAW

The qualifications for an applicant for a gaming license are contained in R.S. 4:525, 530, 531, 532 and 536.

The applicants ranked number one and two in the Perryman Consultant's report, Catfish Queen Partnership In Commendam/Jazz Enterprises, Inc. and Louisiana Casino Cruises, Inc., have qualified to receive licenses to conduct gaming activities by meeting the requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act.

D. CONCLUSION

The Division will grant a license to conduct gaming activities on a riverboat to Catfish Queen Partnership In Commendam/Jazz Enterprises, Inc. subject to the conditions accepted by the applicant at the public hearing.

The Division will grant a license to conduct gaming activities on a riverboat to Louisiana Casino Cruises, Inc. subject to the conditions accepted by the applicant at the public hearing.

The Division will deny a license to Lady Luck Baton Rouge Casino, Inc. The grounds for the denial will be that all fifteen licenses authorized by Louisiana Riverboat Economic Development and Gaming Control Act have been issued. This denial is without prejudice. The applicant may reapply to the Division in the future should any licenses become available.

READ, RENDERED AND SIGNED in Baton Rouge, Louisiana, this 18th day of July, 1994.

/s/ Lt. Marcal Poullard
LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Catfish Queen Partnership In Commendam/Jazz Enterprises is granted a license to conduct gaming activities on a riverboat from the docking facility at Catfish Town. This license is subject to the following conditions:

1. The applicant operate under his plan of security and internal controls for a period of six months, allowing the Division to make any changes it deems necessary.

2. The applicant submit to a mock cruise prior to the commencement of gaming activities for the general public. The mock cruise shall not be conducted until the vessel is certificated by the United States Coast Guard.

3. The vessel shall be certificated by the United States Coast Guard. Such certification shall not have

any restrictions attached. This is a permanent condition.

4. The applicant obtain approval of the docking facility from the appropriate federal agencies.

5. The applicant shall remit the fifty thousand dollar ($50,000.00) application fee to the Division no later than 4:30 p.m. on July 22, 1994.

6. The Division approves the slot configuration on the vessel. This is a permanent condition.

7. The licensee will, within thirty days, conduct and deliver to the Division an underwater survey of the route to determine the presence of underwater obstructions of a magnitude which would prevent the riverboat from cruising. Should an underwater obstruction of a nature that would prevent cruising be discovered, then the licensee will not commence operations without the Division's approval.

8. The licensee shall install separate turnstiles for each exit and entrance to the riverboat to determine the number of patrons entering and exiting the vessel for each scheduled cruise.

Each turnstile shall contain a meter which will count each patron as they enter or exit the vessel. Each meter will be read and a record made of the meter shown both before and after the scheduled excursion. All meters shall be read at the same time. No boarding shall be allowed while the meters are being read.

All patrons shall enter and exit through a turnstile unless a physical handicap makes this impractical. In such case, the licensee shall keep a separate and distinct record of the number of such persons entering and exiting the vessel.

If the licensee permits employees to engage in gaming activities before or after working, the employee must exit and reenter the vessel.

The licensee shall make monthly reports to the Division in a format approved by the Division. This is a permanent condition.

9. The licensee provide the Department of Revenue and Taxation with a completed representation letter from Ronald Johnson within ten days of the date of this order.

This order shall serve as a conditional license. The licensee may commence activities for which a license is required upon the receipt of this document. A permanent license will be issued upon compliance with the above stated conditions.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Louisiana Casino Cruises, Inc., is granted a license to conduct gaming activities on a riverboat from the docking facility near the state capitol. This license is subject to the following conditions:

1. The applicant operate under his plan of security and internal controls for a period of six months, allowing the Division to make any changes it deems necessary.

2. The applicant submit to a mock cruise prior to the commencement of gaming activities for the general public. The mock cruise shall not be conducted until the vessel is certificated by the United States Coast Guard.

3. The vessel shall be certificated by the United States Coast Guard. Such certification shall not have

any restrictions attached. This is a permanent condition.

4. The applicant shall remit the fifty thousand dollar ($50,000.00) application fee to the Division no later than 4:30 p.m. on July 22, 1994.

5. The Division approves the slot configuration on the vessel. This is a permanent condition.

6. The licensee will, within thirty days, conduct and deliver to the Division an underwater survey of the route to determine the presence of underwater obstructions of a magnitude which would prevent the riverboat from cruising. Should an underwater obstruction of a nature that would prevent cruising be discovered, then the licensee will not commence operations without the Division's approval.

7. The licensee shall install separate turnstiles for each exit and entrance to the riverboat to determine the number of patrons entering and exiting the vessel for each scheduled cruise.

Each turnstile shall contain a meter which will count each patron as they enter or exit the vessel. Each meter will be read and a record made of the meter shown both before and after the scheduled excursion. All meters shall be read at the same time. No boarding shall be allowed while the meters are being read.

All patrons shall enter and exit through a turnstile unless a physical handicap makes this impractical. In such case, the licensee shall keep a separate

and distinct record of the number of such persons entering and exiting the vessel.

If the licensee permits employees to engage in gaming activities before or after working, the employee must exit and reenter the vessel.

The licensee shall make monthly reports to the Division in a format approved by the Division. This is a permanent condition.

8. Mr. Pete Clements shall sell all of his stock in Capitol Lakes Properties within thirty days of the date of this order. The Division must receive documentation verifying the sale of the stock and Mr. Clements' resignation within thirty-five days of the date of this order.

This order shall serve as a conditional license. The licensee may commence activities for which a license is required upon the receipt of this document. A permanent license will be issued upon compliance with the above stated conditions.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Lady Luck Baton Rouge Casino be denied a license to conduct gaming activities on a riverboat. This application is denied on the grounds that all fifteen licenses have been issued. This denial is without prejudice.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard
LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC. AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVERBOAT IN BATON ROUGE

SUPPLEMENTAL REASONS FOR RULING

A public hearing was conducted by the Riverboat Gaming Enforcement Division of the Office of State Police to consider the applications of Lady Luck Baton Rouge Casino, Inc., Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam/ Jazz Enterprises, Inc., for the two remaining licenses to conduct gaming activities on riverboats in the State of Louisiana.

On July 18, 1994, Reasons For Ruling and an order regarding each applicant were rendered. Licenses were granted to Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam. Lady Luck Baton Rouge Casino, Inc., was denied a license.

The Reasons For Ruling did not make a finding regarding the suitability of Lady Luck who was denied a license.

On July 21, 1994, Lady Luck filed a motion for reconsideration of the decision on suitability. This motion asks the Division to amend the reasons for Ruling to state that Lady Luck was found to be suitable to conduct gaming activities on a riverboat.

The Division asked the other two applicants to file responsive pleadings to Lady Luck's motion. Louisiana Casino Cruises, Inc., filed a memorandum in opposition. The Division was advised by counsel for Catfish Queen that it would file no opposition. The Division requested Catfish Queen file a letter with the Division officially stating their position.

The attorney for the Division conferred with the attorneys for Lady Luck and Louisiana Casino Cruise to discuss the procedure that would be used at the hearing on the motion. Attorneys for both applicants waived formal notice of the hearing.

The matter was submitted to the Division on briefs prepared by Lady Luck and Louisiana Casino Cruises.

During the decision making process, the Division considered the qualifications of all three applicants. The Division determined that the three applicants met the qualifications requirements contained in the Riverboat Act to varying degrees. Lady Luck was ranked third among the three applicants in this area due to concerns regarding its financing, its docking facility, its lack of the necessary permits from the Coast Guard and the Corp of Engineers, and the resulting delay in the commencement of operations because of these concerns.

The Division considered the Perryman Report in reaching its decision regarding the qualifications of the three applicants. The Division found that the ranking by the Perryman Report on the economic

impacts of the three applicants was consistent with the Division's ranking regarding the qualifications of the applicants.

In light of these rankings, licenses were issued to Catfish Queen and Louisiana Casino Cruises.

It is the finding of the Division that Lady Luck is found suitable, however all of the findings expressed in the original reasons of ruling are incorporated by reference and the ranking and licensing of the applicants remains unchanged.

In light of this ruling, it is unnecessary to amend the order regarding Lady Luck.

READ, RENDERED AND SIGNED this 22nd day of July, 1994, in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

Supreme Court, U.S.
FILED
JUL 27 2010
OFFICE OF THE CLERK

No. 09-1387

IN THE SUPREME COURT OF THE UNITED STATES

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.,

Petitioner,

v.

PERRYMAN CONSULTANTS, INC., M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, INC., and ARGOSY GAMING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

LAW OFFICES OF
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REPLY BRIEF

I. QUESTIONS PRESENTED

Respondents gravely mischaracterize the nature of this case asserting this case concerns "alleged" misrepresentations made in an administrative proceeding. Opp.1. To the contrary, the undisturbed findings of the jury were that Respondents "knowingly and intentionally made materially false, untrue and/or misleading representations in their application for a license" ("License") submitted to the Louisiana Gaming Division, these misrepresentations violated the Louisiana Riverboat Act, the Gaming Division would have denied Respondents' License application, and Petitioner would have been awarded that License. A-51 to A-53. Although the state intermediate appellate court found the *Noerr-Pennington* doctrine immunized Respondents' actions from liability, the lower court recognized that Respondents did indeed make misrepresentations and/or omissions to the Gaming Division in its adjudicatory process. A-38 to A-39.

II. THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT AND NUMEROUS FEDERAL COURTS AS THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE MISREPRESENTATIONS MADE IN AN ADJUDICATORY PROCESS

Respondents claim "the holding below is wholly consistent with this Court's decisions, which have never recognized an exception for *Noerr-Pennington* immunity of the sort advanced by petitioner." Opp.14. To the contrary, the lower court's holding conflicts directly with this Court's decisions of *California Motor Transport*, *Allied Tube*, and *BE&K*.

It is undisputed that Respondents made misrepresentations in the adjudicatory process of the Gaming Division. The jury found that Respondents intentionally made materially false, untrue and/or misleading representations in their License application in violation of the Riverboat Act and the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPL"). A-51 to A-52.

The lower court's decision conflicts with the seminal case of *California Motor Transport*, where this Court clearly declared: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process". *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Again in *Allied Tube*, this Court recognized that "unethical and deceptive practices

can constitute abuses of administrative or judicial processes that may result in antitrust violations" outside *Noerr* protection. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Therefore, the lower court improperly immunized Respondents' misrepresentations in conflict with *Allied Tube*.

Although Respondents cite *Allied Tube* for the proposition that this Court has "noted that a legislatively created board weighing a discretionary decision does not function in an adjudicatory manner. *See* 486 U.S. at 504" (Opp.19), *Allied Tube* made no such holding.

In *Allied Tube*, this Court rejected the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action". *Id.*, 486 U.S. at 503. Thus, this Court has noted different standards apply to misrepresentations made in administrative or adjudicatory processes as compared to political settings. However, in *PRE* this Court declined to address the issue raised here: "to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" made in an administrative or judicial process. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 61, n.6 (1993). This Court should grant this Petition to do so.

Respondents discount *California Motor Transport* and *Allied Tube*, asserting this Court's

decisions pre-date *PRE*. Opp.16, FN10. Yet, *PRE* defined the test for the sham litigation exception to the *Noerr-Pennington* doctrine, which is not at issue here; thus, *PRE* is not controlling.

Respondents also claim that *BE&K* "adds nothing to petitioner's case". Opp.20. This Court again emphasized in *BE&K* (nine years after *PRE*) that the *Noerr-Pennington* doctrine did not extend to "illegal and reprehensible practice[s] which may corrupt the ... judicial proces[s]," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002). Accordingly, the lower court improperly extended the *Noerr-Pennington* doctrine to protect Respondents' misrepresentations and illegal activity committed in an adjudicatory process--conduct well beyond the limits consistently identified by this Court over the last four decades in *California Motor Transport*, *Allied Tube*, and *BE&K*.

Respondents claim that Petitioner has not identified "a single decision that is in conflict with the ruling in this case." Opp.1-2. To the contrary, Petitioner identified many cases that recognize that the knowing submission of false facts to an administrative or adjudicatory body is not protected under the *Noerr-Pennington* doctrine; Petitioner also listed a few articles by legal commentators that discuss the misrepresentation exception caselaw in detail, which show the lower court's ruling was in error. Pet. 32-33. Further, the Federal Trade Commission ("FTC") issued a report in 2006 entitled "Enforcement Perspectives on the *Noerr-Pennington* Doctrine" ("FTC Report"), which observed the weight

of the caselaw has recognized a misrepresentation exception to the *Noerr-Pennington* doctrine, including nine federal circuit courts. *See* FTC Report, particularly 22-28, *e.g. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements."); *see also Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) ("We see no reason to believe that the right to petition includes a right to file deliberately false complaints.").

However, the lower courts have applied the misrepresentation exception in varying situations and under differing standards. *Id.* The FTC recognized there is an absence of guidance from this Court if and when the *Noerr-Pennington* doctrine protects deliberate and material misrepresentations in non-political contexts, stating:

> Equally clearly, the doctrine recognizes that not all activities directed at government are genuine attempts to request a sovereign government action. What is not clear, however, are the exact boundaries of *Noerr*'s protection for such activities, and neither the Supreme Court case law nor federal appellate decisions provide a firm guide.

FTC Report, 16. Accordingly, this Court should answer the question left open in *PRE* to articulate when the misrepresentation exception applies to the *Noerr-Pennington* doctrine.

The lower court based its application of the *Noerr-Pennington* doctrine on the finding that Petitioner failed to meet "its burden of showing that the defendants' acts rose to the level of criminality to satisfy the standard set forth by the court in *Astoria*." A-38. *Astoria* made no such holding. In *Astoria Entertainment, Inc. v. DeBartolo,* 12 So.3d 956 (La. 2009), the Louisiana supreme court recently found "no reason to give the defendants' illegal actions First Amendment constitutional protection" and held the *Noerr-Pennington* doctrine "should not be expanded to protect illegal activity, especially in claims that arise outside of the scope of antitrust laws." *Astoria*, 12 So.3d at 967. The *Noerr-Pennington* doctrine does not protect illegal actions, which the jury found here; therefore, the lower court wrongly held that only a showing of criminality will vitiate the *Noerr-Pennington* doctrine.

This inconsistent application of the *Noerr-Pennington* doctrine by the Louisiana courts highlights the need for this Court to clarify if and when *Noerr-Pennington* immunizes misrepresentations made in an adjudicatory or administrative proceeding. Importantly, *Astoria* noted:

> while the [Supreme] Court, in dicta, has discussed *Noerr-Pennington*

> immunity relative to illegal actions in several cases, we find no guidance in the Court's statements.

Astoria, 12 So.3d at 965. This Court should grant this Petition to provide this missing guidance to the courts—an issue that has sweeping importance and has divided or confused other courts.

III. RESPONDENTS' VIOLATIONS OF VALID STATUTES ARE NOT ENTITLED TO PROTECTION UNDER THE *NOERR-PENNINGTON* DOCTRINE

The lower court applied the *Noerr-Pennington* doctrine based on the finding that Respondents' misrepresentations "did not subvert the Division's decision-making process to the extent that the Division could not effectively evaluate the three proposed projects". A-37. Not only was the conclusion incorrect, but the lower court applied the wrong standard. Conduct that violates a valid statue or achieves an illegal result is not protected by the First Amendment under *California Motor Transport*, where this Court stated:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

404 U.S. at 513-514. In addition, this Court held in *California Motor Transport* that *Noerr-Pennington*

immunity is not available when "the administrative and judicial processes have been abused" when "those processes produced an illegal result" [404 U.S. at 513] or "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful" [404 U.S. at 515]. These conditions are met here to preclude the application of the *Noerr-Pennington* doctrine.

The jury found Respondents violated valid statutes of the Riverboat Act and the LUTPL by their intentional submission of misrepresentations and/or omission of material facts. A-51 to A-52. Therefore, Respondents' conduct is not protected under the First Amendment or the *Noerr-Pennington* doctrine.

Moreover, the Gaming Division's License process was deprived of its legitimacy. La. R.S. 27:76(A)(2) and of the Riverboat Act mandates the disqualification of an applicant that submits material misrepresentations and omissions in a License application. A-67. Contrary to Respondents' claim at Opp.3, their material misrepresentations could not be corrected by amendment. There is no discretion. *Lambert v. Riverboat Gaming Enforcement Div.*, 96-1856, p.9 (La.App. 1 Cir. 12/29/97) 706 So.2d 172, 177. Thus, the jury properly found that the License should not have been issued to Respondents. A-52.

Respondents' misrepresentations and unlawful acts abused the Gaming Division's License process because it produced an "illegal result"--

Respondents violated the Riverboat Act but obtained a License. Under *California Motor Transport*, the lower court improperly extended the *Noerr-Pennington* doctrine to immunize the Respondents' illegal acts.

IV. *ARMSTRONG* INVOLVES POLITICAL ACTIVITY NOT PRESENT HERE AND IS NOT CONTROLLING

Armstrong does not parallel "this case in nearly all respects" as Respondents incorrectly assert. Opp.22. *Armstrong* is easily distinguishable from this case because *Armstrong* involved policy considerations not present here and, further, is in conflict with several other courts that dealt with the same issue.

The plaintiff in *Armstrong* contended the defendant and its physicians conspired to prevent it from establishing a new surgery center. Under the Pennsylvania law, anyone proposing to establish a new health care facility must first obtain a Certificate of Need ("CON") from Pennsylvania's Department of Health. *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.*, 185 F.3d 154, 156 (3d Cir. 1999). The Department reviewed CON applications and made a determination on the adequacy of existing health care providers and the need for additional facilities. *Id.* In *Armstrong*, plaintiff petitioned for an increase in the number of hospitals in a particular market from one to two.

In a 2-1 decision, the *Armstrong* majority held:

> The risk that the plaintiff's injury is not the result of a bona fide execution of state policy is far less substantial here than in *Omni* and there is, accordingly, far less justification for federal court review of the state's policy judgment.

Armstrong, 185 F.3d at 164. The *Armstrong* majority found the policy judgments made by the agency to deny the CON afforded protection to the defendants under the *Noerr-Pennington* doctrine. *Id.*

Neither Petitioner nor Respondents asked the Division to increase the number of licenses authorized under the Riverboat Act (nor was the Division empowered to make such a legislative decision). Petitioner and Respondents simply asked the Gaming Division to approve their respective applications under the existing standards set forth by the Louisiana legislature in the Riverboat Act. *Armstrong* involved policy judgments, *i.e.* political activity, not present here. Therefore, *Armstrong* is not controlling or instructive to the present case.

Respondents improperly characterize the Division as a policy making agency. Opp.17. The Gaming Division rendered an adjudication under La. R.S. 27:73(A) to determine whether the License applicants met the requirements of the Riverboat Act. A-66. In reaching its decision, the Gaming Division followed the policies already promulgated by

the Legislature in the Riverboat Act. Even the lower court acknowledged that Respondents were not engaged in petitioning activity in the sense of *Noerr*:

> [t]he alleged material misrepresentations [of Respondents] in the underlying case were not designed to influence policy but rather to purportedly undermine the means of effectuating that policy.

A-26. Nevertheless, the lower court improperly applied the *Noerr-Pennington* doctrine to immunize Respondents' misrepresentations made in an adjudicatory setting.

Armstrong is distinguishable for another reason; the majority based its decision on the following finding:

> the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record straight.

Armstrong, 185 F.3d at 163. This critical factor is missing here. In the present case, the Louisiana supreme court found the License hearings were between each separate applicant and the Gaming Division, not between one applicant and another (*i.e.*, Petitioner was not a party to Respondents' License hearing) and, further, found due process considerations precluded the lower court from

applying the Gaming Division's findings to any of the issues raised against Respondents in this civil action. *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc., 05-0090, 05-0091* (La. 3/24/05) 897 So. 2d 584, adopting the dissent set forth below at 03-1983, 03-1984 (La. App. 1st Cir. 11/3/04), 889 So.2d 304, 311-312. Unlike *Armstrong*, there was no opportunity for Petitioner "to set the record straight" in Respondent's License hearing. *Armstrong* is inapposite.

Moreover, *Armstrong* contains a robust dissent, based in part on *Armstrong's* conflict with the Third Circuit's own ruling issued in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999). *Armstrong*, 185 F.3d at 164. The majority in *Armstrong* also admitted its result "conflicted" with the holdings of other circuits, including *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986), *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) and *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568 (6th Cir. 1986). *Id.*, at FN7.

In *St. Joseph's Hospital*, the court found a misrepresentation to a state health planning agency to be entirely beyond *Noerr-Pennington* coverage, finding:

> When a governmental agency such as [the State Health Planning Agency] is passing on specific certificate applications it is acting judicially. Misrepresentations under these

> circumstances do not enjoy *Noerr* immunity.

795 F.2d at 955. Likewise, the Gaming Division was acting judicially in the License approval process; thus, Respondents' misrepresentations were not entitled to protection under the *Noerr-Pennington* doctrine. The dissent in *Armstrong* also listed numerous other cases that reached different results than the majority opinion. *Armstrong* dissent, 185 F.3d at 168. *Armstrong* is far from the definitive authority Respondents portray it to be and is, quite frankly, wrong as a matter of law.

The *Armstrong* majority improperly relied upon *Omni* to reach its decision. *Omni* concerned lobbying activity, where the *Noerr-Pennington* doctrine is given a wide berth. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 381-382 (1991). Thus, *Armstrong* and its reliance on *Omni* is not persuasive here because the setting is an adjudicatory arena, not a lobbying or legislative one.

Respondents cite to *Unocal* in support of the lower court's decision (Opp.20-21, FN12); yet, the FTC ruled in *Unocal* that deliberate misrepresentations outside of the political context that undermine the legitimacy of government proceedings should not be entitled to the protection of the *Noerr-Pennington* doctrine. *In the Matter of Union Oil Co. of California*, FTC Docket No. 9305, 2004 WL 1632816 *30 (F.T.C. 2004). Respondents' deliberate misrepresentations undermined the

legitimacy of the Gaming Division's License process because Respondents violated the Riverboat Act but still obtained a License. Further, Respondents' lengthy discussion of the briefs filed in *Armstrong* (Opp.25-28) is not persuasive as those briefs pre-date the different conclusions made in *Unocal* and the FTC Report of 2006.

V. JURISDICTION LIES UNDER 28 U.S.C. §1257(a)

28 U.S.C. §1257(a) provides this Court may review cases from the highest court of a state, in which review may be had where any title, right, privilege or immunity is specially claimed under the Constitution of the United States. Although Petitioner brought this action against Respondents under state law, Respondents raised a federal issue by asserting the non-statutory affirmative defense of the *Noerr-Pennington* doctrine, which was created by this Court and is fundamentally grounded in First Amendment principles. By asserting this defense, Respondents necessarily claim immunity from liability based on acts they assert are protected by the Constitution of the United States.

The lower court found "the *Noerr-Pennington* immunity doctrine affords [Respondents] immunity from liability". A-38. The lower court's decision rests on its misapplication of this immunity doctrine grounded on the First Amendment and jurisdiction clearly lies with this Court under §1257(a).

In *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), the case offered by Respondents is illustrative of an appropriate finding of jurisdiction, where this Court held:

> when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Just as the lower court in *Michigan v. Long* relied exclusively on its understanding of the *Terry* doctrine developed by this Court, the lower court rendered its decision in this case based exclusively on its misapplication of the *Noerr-Pennington* doctrine created by this Court. Consequently, this Court has jurisdiction to review this important federal question regarding the application of the *Noerr-Pennington* doctrine.

VI. THE APPLICATION OF *NOERR-PENNINGTON* IS A PURE LEGAL QUESTION

As the lower court properly stated, the application of the *Noerr-Pennington* doctrine is a question of law. A-27. Yet, Respondents improperly

rely on Gaming Division's findings from the hearing on Respondents' License application (to which Petitioner was not a party). Notwithstanding, the Gaming Division found Petitioner "met the qualifications requirements contained in the Riverboat Act." Opp. App.32. Respondent's spin on the facts is irrelevant to this Court's consideration of whether to grant this Petition, which is based on the following legal question:

> Are Respondents' illegal acts and deliberate misrepresentations in an adjudicatory process immunized under the *Noerr-Pennington* doctrine based on First Amendment principles?

The answer to this federal question is emphatically no.

Respectfully Submitted,

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